

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-11833

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1183

*B
Pry S*

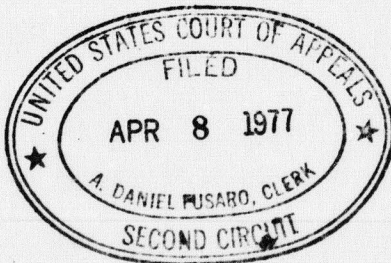
UNITED STATES OF AMERICA,
APPELLEE,

-VS-

MARGARET ROBINSON and PATRICIA SAVERESE,
APPELLANTS.

On Appeal From The United States District Court
For The District of Connecticut

JOINT APPENDIX TO BRIEFS FOR APPELLANTS ROBINSON AND SAVERESE



ANDREW B. BOWMAN
FEDERAL PUBLIC DEFENDER
770 CHAPEL STREET
NEW HAVEN, CONNECTICUT 06510
(FTS) 8-643-8148
ATTORNEY FOR MARGARET ROBINSON

JOHN R. WILLIAMS
265 CHURCH STREET
NEW HAVEN, CONNECTICUT
(203) 562-9931
ATTORNEY FOR PATRICIA SAVERESE

PAGINATION AS IN ORIGINAL COPY

CONTENTS OF APPENDIX

	<u>Page</u>
Docket Sheet	1
Robinson's Notice of Appeal	8
Indictment	9
Decision in <u>United States v. Newman,</u> (Jan. 25, 1977), Slip Op. 1559	12
Robinson's Motion to Dismiss	36
Saverese's Motion to Dismiss	37
District Court's Ruling on Defendants' Motion To Dismiss (March 25, 1977)	38
Robinson's Motion for Stay	48
Saverese's Motion for Stay	52
Government's Response in Opposition to Appellant's Motion for Stay of Proceedings	57
Court of Appeals Orders Denying Stay and Expediting Appeals	60 and 61
Transcript of Impanelling and Swearing of Jury (Nov. 29, 1976)	62
Transcript of Proceedings in Response to Court of Appeals Mandate (March 7, 1977) . .	100

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY			
DATE	DOCUMENT NO.	Interval Section (a)	Start Date End Date (b)	Ex- clude (c)	Total Days (d)		
1976 6/21/76	JURY TRIAL COMMENCES: 12:25 P. M. Oath on voir dire administered. 40 jurors respond to roll call. 8 jurors absent at time of roll call. Court describes case to jury. Three jurors excused for cause. Govt. allowed seven challenges to jury and alternates. Deft. allowed thirteen challenges to jury and alternates. The case will have a jury of twelve and five alternates. 12:57 P.M. Jury panel excused until June 30, 1976. Clerk's Office will notify those chosen in this case. Oath to be administered on date trial begins. Deft. Robinson moves to expunge the challenges of the govt. Deft. Savarese joins the motion. Court will defer ruling at this time. Clerk will keep the present record as it stands now until ruling is rendered. Newman, J. m-6/21/76.						
6/29	Brief in Support of Motion to Strike the Govt's Jury Challenges, filed by deft. Savarese						
7/21	Govt's Response in Opposition to Deft's Motion to Strike Govt. Jury Challenge, filed.						
7/22	Govt's Motion to Compel Handwriting Exemplars and Memorandum In Support of Hit's Motion to Compel Handwriting Exemplars re: deft. Savarese, filed.						
7/23	Motion for Permission to Inspect Juror Qualification Questionnaires, Courtroom Minutes and Peremptory Challenge Sheets from June 1974, to Date of this Motion On File with the Clerk, U. S. District Court, Hartford, Connecticut, filed by deft. Robinson.						
8/2	Court Reporter's Sound Recording of Proceedings (Plea) held on May 3, 1976, filed. Russell, R.						
8/3/76	Motion for Permission to Inspect Juror Qualification Questionnaires, Courtroom Minutes and Peremptory Challenge Sheets from June, 1974 to Date of the Motion on File with the Clerk, U. S. D. C., Htfd, Conn. endorsed: Motion granted. Newman, J. m-8/5/76. copies mailed to counsel.						
8/17	Notice of Defense of Insanity, filed by deft.						
8/19	Motion for Psychiatric Examination, filed by govt.						
8/25	Hearing held on Govt. Motion for Psychiatric Exam. Motion granted. Atty. Bowman moves to be present during Dr. Miller's examination. Court suggests that counsel should discuss the request with Dr. Miller to see if Atty Bowman can be present or in an area						
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER		

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

ROBINSON, MARGARET LEE

76 N-76-63

Yr. Docket No. Dis

V. EXCLUDABLE DELA

(a) (b) (c) (d)

DATE	PROCEEDINGS (continued)
1976	(Document No.)
8/25	cont'd where he can listen to the examination. If it can not be worked out the Court will reconsider the motion. Newman, J. m-8/26/76.
8/27	Court Reporter's Notes of Proceedings (motion) heard on 8/25/76, filed. Gale, R.
8/31	Memorandum in Support of Deft. Robinson's Motion to Dismiss, to Strike the Array, or to Strike the Peremptory Challenges of the Govt. and Affidavit of Mario G. Conte, Jr., filed by deft.
9/1/76	Order for Psychiatric Examination, filed and entered. Newman, J. m-9/1/76. copies mailed to counsel
9/30	Brief in Opposition to Govt's Motion to Compel Handwriting Exemplars, filed by deft. Savarese
10/5	Govt's Supplemental Response In Opposition to Deft. Robinson's Motion to Dismiss, filed.
10/15	Memorandum of Decision on Deft's Objection to Govt.'s Peremptory Challenges, filed and entered. Newman, J. m-10/18/76. copies mailed to all counsel of record.
10/18	Govt's Motion to Reconsider and Affidavit of Michael Hartmere, filed by govt.
10/26	Ruling on Govt's Motion to Reconsider: The Court will defer ruling on the Govt's Motion for reconsideration for one week to permit receipt of whatever further submission the govt. cares to make, which shall be filed by Nov. 2, 1976. Newman, J. m-10/27/76. copies mailed to counsel of record.
11/2	Government's Compliance with Court's Ruling of October 26, 1976, filed by govt.
11/4	Ruling on Govt's Motion to Reconsider, filed and entered. Motion is denied. Jury selection will resume on Nov. 29, 1976, Newman, J. m-11/4/76. copies mailed to counsel.
11/24	Court Reporter's Transcript of Proceedings (jury selection) held on June 21, 1976, filed. Gale, R.
11/29	JURY TRIAL AND JURY SELECTION CONTINUES: Motion for continuance, filed by govt. Govt. advises Court that they have mailed a petition for Writ of Mandamus and Motion for Stay to the U.S.C.A. and that a copy was to be hand delivered this morning

over-

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE 1976	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11/29	to the U.S.C.A. Motion for Continuance denied for reasons stated in open Court. Govt. request a voir dire of the remaining jurors re: publicity. 11:35 A.M. Court advises counsel that it has contacted the Court of Appeals and they have not received the petition. Court and counsel discuss the amount of alternate jurors to be selected. 11:50 17 jurors present. 12 jurors and 2 alternates impanelled and sworn. Clerk's office to notify jury when the testimony is to commence. 12:02 P.M. Court adjourned in this matter. Newman, J. m-11/29/76.	3	11/29/76	D	
11/29	Motion for Continuance endorsed: Motion denied for reasons stated in open Court. Newman, J. m-11/29/76 copies mailed to counsel.				
11/30	CJA Form 21 authorizing transcript of Proceedings (Jury Selection) held on Nov. 29, 1976, filed. Newman, J.				
12/1	CJA Form 21 authorizing payment in the amount of \$180.00 to Dr. Marc A. Rubenstein, filed. Newman, J.				
11/29	Court Reporter's Notes of Proceedings (Jury selection) held on Nov. 29, 1976, filed. Gale, R.				
12/3	Motion to Postpone Consideration of Motion to Suppress Identification Testimony, Motion to Suppress Identification Testimony and Motion for Production of Photographic Spread, filed by deft. SAVERESE.				
12/6	Court Reporter's Transcript of Proceedings (Jury selection) held on Nov. 29, 1976, filed. Gale, R.				
12/6	Motion to Postpone Consideration of Motion to Suppress Identification Testimony and Motion for Production of Photographic Spread endorsed: Motion granted., Motion to Suppress Identification Testimony endorsed: Motion deferred until trial. Newman, J. m-12/6/76. copies mailed to counsel of record.				
12/7	CJA Form 21 authorizing payment of \$57.00 to Gerald Gale, Court Reporter, filed Newman, J. copies distributed.				
1977 2/23	A true copy of Order from the U.S.C.A., filed and entered. A petition for a writ of mandamus having been filed and argument having been had thereon. Upon consideration thereof, it is ordered, adjudged and decreed that the petition for a writ of mandamus be and it hereby is granted and that the action be and it hereby is remanded to said District Court	3	2/23/77	D	87

PROCEEDINGS

DATE	
1977	
2/23	for further proceedings in accordance with the opinion of this Court. Fusaro, C. m-2/23/77.
3/7	On JON's Jury Assignment List: Govt. is ready. Court and counsel for depts discuss the alternatives offered by the U.S.C.A. Counsel for depts reject both alternatives. Court rules that in accordance with the mandate of the U.S.C.A., the depts having rejected the first alternative, a mistrial is declared. Deft's request one week for filing motion to dismiss and that jury selection be deferred until a decision is rendered on the motions to dismiss-granted. Newman, J. m-3/8/77.
3/14	Court Reporter's Transcript of Proceedings (JAL) held on 3/7/77. filed, Gale, R.
3/14	Motion to Dismiss and Memorandum in Support of Motion to Dismiss, filed by deft. ROBINSON.
3/15	SAVARESE: Motion to Dismiss on Ground of Double Jeopardy, filed by deft.
3/21	Court Reporter's Notes of Proceedings held on 3/7/77, filed, Gale, R.
3/21	Memorandum in Support of Govt's Objection to Deft's Motion to Dismiss on Grounds of Double Jeopardy, filed by govt.
3/23	CJA Form 21 authorizing payment of \$10.00 to Gerald Gale, Court Reporter, filed. Newman, J. copies mailed to A.O. for payment.
3/25	SAVARESE: Brief of Defendant Savarese in Support of Motion to Dismiss on Grounds of Double Jeopardy, filed by deft.
3/28	Ruling on Deft's Motion to Dismiss, filed and entered. Motion to Dismiss is denied. Jury selection will occur March 30, 1977. Newman, J. m-3/28/77. copies handed to Atty Hartmere and Atty. Bowman. copy mailed to Atty. Williams.
3/29	ROBINSON: Notice of Appeal, filed by deft. copies mailed to counsel and to U.S.C.A. together with cert. copies of docket entries mailed
" "	SAVARESE: Notice of Appeal, filed by deft. Cert. copies of docket entries and Notice of Appeal mailed to Clerk, U.S.C.A.
3/30	On JON's Jury Assignment List: Deft's (ROBINSON) Submission of Voir Dire Questions, filed by deft. Court and counsel discuss proposals in Court's ruling of March 28, 1977. Defense counsel request that jury selection be deferred as they have filed a motion for a stay in the U.S.C.A.. Motion is granted, in the event there is an adverse decision from the Court of Appeals, jury selection is deferred until Apr. 11, 1977. Newman, J. m-3/31/77.

OFFENSE PO
OFFENSE MO
MEANOR Mis
FELONY Fel

JUDGE/MAGISTRATE Assigned

U.S.

W. V. RESE, P. PRISON

Case Filed

Mo. Day

No. of Defs

JUVENILE

JUN 9. 1976
JON O. NEWMAN

76 N-76-00

Yr. Docket No. Del.

U.S. TITLE/SECTION

10:3/1

OFFENSES CHARGED

conspiracy to violate 18:100

ORIGINAL COUNTS

U.S. MAG.
CASE NO.

BAIL - RELEASE

AMT. ☐ Fugitive
Set ☐ Pre-Recog
PSA ☐
Date ☐ 10% Deposit
Surety Bond ☐
Collateral ☐
Bail Not Made ☐ 3rd ☐ Other
Status Changed (See Docket) ☐ Pity Cost

II. KEY DATES & INTERVALS

SUPERSEDING
COUNTS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Begun 5/3/76 Summons Served First Appearance	High Risk Date Information 4/21/76 Indict Waived In Charging District Superseding Indict/Info	1st Plea Final Plea	Trial Set For 8/30/76 Verdict 6/21/76 Trial Begun Trial Ended

SENTENCE
Disposition of Charges
☐ Convicted
☐ Acquitted
☐ Dismissed
☐ On All Charges
☐ On Lesser Offense(s)
☐ With ☐ W/P
☐ On Government Motion

MAGISTRATE		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL NO.	OUTCOME
Search Warrant	Issued Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT		☐ DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Summons	Issued Served			Date Scheduled Date Held		
Arrest Warrant Issued				Tape Number		
COMPLAINT						
OFFENSE (In Complaint)						

U.S. Attorney or Asst.

Peter C. Dorsey
Michael Hartmore

ATTORNEYS

Defense ☒ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

John R. Williams
26 Church Street
New Haven, Conn.

* Show last names and suffix numbers of other defendants on same indictment/information

DATE	1) ROBINSON (DOCUMENT NO.)	2) BROWN	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
4/21/76	Indictment returned and filed in New Haven. Summons may issue for May 3, 1976 at 10:00 A.M. in New Haven. Newman, J. m-4/22/76.			
4/22/76	Summons issued and handed to U.S. Marshal for service.			
4/29/76	Marshal's return showing service, filed: Summons.			
5/3/76	PLEA: John R. Williams appointed as counsel for deft. Financial Affidavit, filed. Plea of not guilty entered to Count 2. Deft. requests 30 days for motions. Court grants two weeks. Newman, J. m-5/3/76.			
5/4	CJA Form 20 appointing John R. Williams, Esq. to represent deft., filed. Newman, J. copies distributed.			
5/6/76	Notice of Readiness, filed by govt.			
5/13/76	Court Reporter's Notes of Proceedings (Plea) held on 5/3/76, filed. Russell, R.			

(over)

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY			
DATE	(DOCUMENT NO.)			Interval (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)
1976				3	5/18/76	E	
5/18		Motion for Production; Request for Postponement of Hearing on Motion to Suppress Confession; Motion to Transcribe Grand Jury Minutes; Motion to Suppress Confession, filed by deft.					
6/18		Motion to Transcribe Grand Jury Minutes endorsed Motion Granted. Motion to Suppress Confession endorsed: Motion deferred until trial. Motion for Production endorsed: Par #1 granted, Par #2 granted, Par #3 granted as to witnesses Identifying defendant; otherwise denied. Request for Postponement of hearing on Motion to Suppress Confession endorsed Motion granted. Newman, J. m-6/18/76. copies mailed to Attys Hartmere and Williams.		7	6/18/76	E	30
6/21/76		On JON's Jury Assignment List: Jury selected. Trial set for Aug. 30, 1976. Newman, J.					
7/22		see Robinson docket sheet for trial minutes.					
8/2/76		Motion to Compel Handwriting Exemplars & Memorandum, filed by Govt. Court Reporter's Sound Recording of Proceedings (plea) held on May 3, 1976, filed. Russell, R.					
11/5		Endorsement entered on plaintiff's motion to compel handwriting exemplars as follows: Motion Granted. Compliance by November 12, 1976. Newman, J. M-11/5/76. copies mailed to counsel of record.					
11/29		Jury Trial Continues: See Robinson docket sheet for minutes.					
1977		See Robinson docket sheet for further entries.					

FINE AND INSTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

FILED
MAR 29 11 25 AM '77
U. S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

-VS-

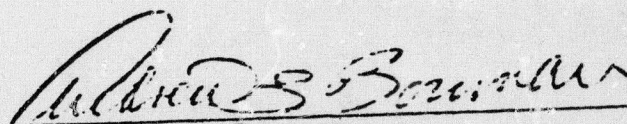
MARGARET LEE ROBINSON

CRIMINAL NO. N-76-63

NOTICE OF APPEAL

Notice is hereby given that the defendant, Margaret Lee Robinson, appeals to the United States Court of Appeals for the Second Circuit from the order denying her motion to dismiss the indictment on Fifth Amendment grounds of double jeopardy entered in this action on March 28, 1977, by the Honorable Jon O. Newman, United States District Judge.

Dated: March 29, 1977


Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
Attorney for Margaret Lee
Robinson

FILED

MAR 21 11 33 AM '76

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES OF AMERICA

v.

MARGARET LEE ROBINSON,
JETHRO R. BROWN and
PATRICIA SAVERESE

CRIMINAL NO.

N-76-63

I N D I C T M E N T

The Grand Jury charges that:

COUNT I

From on or about the first day of December, 1975, up to and including the 19th day of January, 1976, at Hamden, in the District of Connecticut, MARGARET LEE ROBINSON, the defendant herein, being an employee, that is, teller of the First New Haven National Bank, Hamden Office, the deposits of which were then insured by the Federal Deposit Insurance Corporation, within intent to injure and defraud the said bank, wilfully and knowingly did embezzle and convert to her own use the sum of \$1,779.00 of the monies and funds of said bank, which had come into her possession and under her care by virtue of her position as such employee, in violation of Title 18, United States Code, Section 656.

COUNT II

From on or about the first day of December, 1975, up to and including the 19th day of January, 1976, at Hamden, West Haven, Branford, and New Haven, in the District of Connecticut, and elsewhere, MARGARET LEE ROBINSON, JETHRO R. BROWN and PATRICIA SAVERESE, co-defendants and co-conspirators herein, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others whose names are to the Grand Jury unknown, to commit an offense against the United States, that is, to wilfully and knowingly embezzle and convert to their own use monies and funds of the First New Haven National Bank, Hamden Office, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said bank, in violation of Title 18, United States Code, Section 656.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the 6th day of January, 1976, at Hamden, in the District of Connecticut, the defendant JETHRO R. BROWN purchased personal money orders No. 374400 and 374401 from the defendant MARGARET LEE ROBINSON, teller, First New Haven National Bank, Hamden Office, 2305 Whitney Avenue, Hamden.

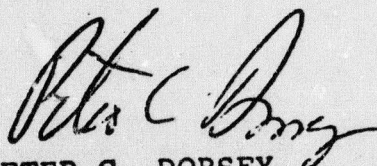
2. On or about the 7th day of January, 1976, at Hamden, in the District of Connecticut, the defendant JETHRO R. BROWN purchased personal money orders No. 374422, 374423 and 374424 from the defendant MARGARET LEE ROBINSON, teller, First New Haven National Bank, Hamden Office, 2305 Whitney Avenue, Hamden.

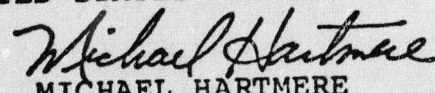
3. On or about the 26th day of December, 1975, the defendants PATRICIA SAVERESE and JETHRO R. BROWN traveled to Caldor's, Hamden, Connecticut.

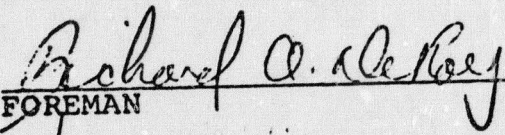
4. On or about the 29th day of December, 1975, the defendants PATRICIA SAVERESE and JETHRO R. BROWN traveled to Caldor's, Branford, Connecticut.

All in violation of Title 18, United States Code, Section 371.

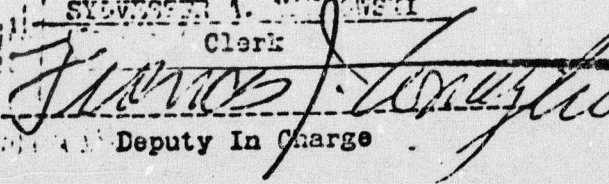
A TRUE BILL


PETER C. DORSEY
UNITED STATES ATTORNEY


BY: MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY


FOREMAN

I hereby certify that the foregoing
is a true copy of the original
document on file. Date: 7/21/76

SYLVESTER J. [unclear]
Clerk
By: 
Deputy In Charge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 663—September Term, 1976.

(Argued December 28, 1976 Decided January 25, 1977.)

Docket No. 76-3077

UNITED STATES OF AMERICA,

Petitioner,

v.

HONORABLE JON O. NEWMAN,

Respondent.

Before :

SMITH, ANDERSON and TIMBERS,

Circuit Judges.

Petition for mandamus by the United States Attorney for the District of Connecticut asking this court on review to vacate and set aside the opinion and ruling of the United States District Court for the District of Connecticut, dated October 15, 1976, Jon O. Newman, *Judge*, disallowing four peremptory challenges by the Government and ordering an explicit remedy, on the ground that the Government had adopted a pattern of excessive challenges against veniremen of the Black race.

Petition granted and case remanded.

JOSEPH S. DAVIES, JR., Esq., Department of
Justice, Washington, D. C. (Peter C. Dorsey,
U. S. Attorney, District of Connecticut, and

1559

Jerome M. Feit, Esq., Department of Justice,
Washington, D. C., on the brief), *for Petitioner.*

ANDREW B. BOWMAN, Federal Public Defender,
New Haven, Conn. (Peter Goldberger, Asst.
Federal Public Defender, and counsel for
defendant Margaret Lee Robinson, on the
brief), and

JOHN R. WILLIAMS, Esq., New Haven, Conn. (and
counsel for defendant Patricia Savarese),
for Respondent.

(Jack Greenberg, Esq., Charles Stephen
Ralston, Esq., and Lynn Walker, Esq., New
York, New York, on the *Amicus Curiae*
brief of The NAACP Legal Defense and
Educational Fund, Inc.).

ANDERSON, *Circuit Judge:*

On April 21, 1976 Margaret Lee Robinson was indicted by a Grand Jury in the United States District Court for the District of Connecticut for the crime of embezzlement of \$1,779 from a federally insured bank in violation of 18 U.S.C. §556 and for conspiracy to commit that substantive offense, 18 U.S.C. §371. On the conspiracy count two others, Jethro Brown and Patricia Savarese, were also indicted. The case was assigned for a jury trial to Judge Jon O. Newman and the process of selecting the jury commenced on June 21st. Of the 48 veniremen summoned for jury duty, 40 reported to the court and, after the voir dire and the challenges for cause had been ruled upon, the clerk, at the direction of the court, drew 37 names from the jury box to constitute the jury pool from which the jury panel of

twelve and five alternates¹ were to be drawn. The peremptory challenges were then exercised in accordance with F.R.Crim. P. 24: 7 by the Government and 13 by the defendants. The Government peremptorily challenged three White and four Black veniremen, the latter constituting all of the Black veniremen in the jury pool; and the defense so challenged 13 White veniremen. The public defender for the defense then moved to expunge the Government's peremptory challenge of the four Black veniremen on the ground that their exclusion was an act of invidious discrimination by the United States Attorney.

Judge Newman then inquired of the Government whether it wished to state a non-racial reason for challenging the four Black veniremen in the jury pool. The Government however, replied that it did not, on the ground that inquiry into and disclosure of reasons underlying a peremptory challenge were contrary to the nature and purpose of the peremptory challenge.

The case was then continued to permit the defendants to present a statistical analysis to support their claim. The Federal Public Defender's statistical analysis, filed with the court on August 31, 1976, covers a two-year period June, 1974—June, 1976, during which 72 criminal jury trials (including the present case) were held in the following divisions² of the United States District Court: Hartford and New Haven.

1 The unusually large number of alternates for what was estimated to be a trial of only a few days, was ordered because the trial itself was not scheduled to go forward until late August.

2 The divisions are set out in Part IV of the Jury Selection Plan for the United States District Court for the District of Connecticut, established by order of the court on September 23, 1968 as amended, which part designates the county or counties from which each seat of court, i.e. Hartford, New Haven, including Waterbury, and Bridgeport will draw its venire for jury service.

The basic data was compiled by a student intern, who was a senior at the University of Connecticut Law School and who worked as a researcher in the office of the Public Defender. He reported that for the 47 jury trials which took place at the Hartford seat of court, there were for 23 of those trials no Black individuals in the general array; that out of arrays totalling 2519 people,³ 10 Black persons appeared 75 times. He also said that there were 17 trials in which potential Black jurors, drawn from the jury pool, were eliminated solely by the Government's peremptory challenges; that out of 47 trials, there were 40 trials in which Blacks were either not present in the array or were eliminated by Government challenge; and out of 47 trials studied, Blacks became jurors four times.

³ According to the researcher's report on the Hartford seat of court during the two-year period, there were 47 trials, during 23 of which the "general array" (presumably the jury box with all of the names of persons on the jury list—each name with address on a separate card—inside of the box) contained no name of a Black person. He further reported that out of arrays totalling 2519 people, 10 Black persons appeared 75 times.

In the very next paragraph of the text of this opinion we note that the researcher reported that for the New Haven Division "... in arrays totalling 1591 people, names of Blacks appeared only 54 times." But there is no information reported there or anywhere in the record, about the total number of veniremen in the general arrays, that is, the total number of names in the jury boxes, for any particular period of time. See affidavit of Judge Newman, dated December 14, 1976, at n. 4. What to the researcher is simply an "array" is presumably the number of veniremen ordered by the court to be drawn from the jury box to constitute a pool from which trial juries for one or more cases are drawn. The researcher's large totals of 2519 and 1591, above mentioned as total arrays, are the result of adding all of the jury pools drawn from the box, with one superimposed upon another regardless of the extent to which succeeding pools are composed of the same individuals. When a pool has served its purpose and the trials of the cases for which the pool was drawn have finished, the names are put back in the box and many of the same veniremen are used over and over again. What significance lies in a grand total of all of the used pools is far from clear; and it is even more confusing when there is no way of knowing what veniremen are used, not once, but several times.

The researcher also made studies of the 24 criminal jury trials held during the same two years in the New Haven and Waterbury seats of court, which draw the veniremen from the same areas, and were, therefore, consolidated for the purposes of the survey. He reported that seven out of 24 trials had no Blacks in the general array; that in arrays totalling 1,581 people, Blacks appeared only 54 times; that of the 31 times that Blacks were chosen for the final panel, they were eliminated 12 times by Government challenge and five times by defense challenge; and that 14 Blacks were empanelled as jurors, three in the trials of Black defendants and 11 in the trials of White or Hispanic defendants.

The researcher presented the foregoing data to the Public Defender in the form of an affidavit which was submitted to the district court judge with the Public Defender's brief in support of his motion to strike the Government's jury challenges. The Government, proceeding on the assumption that, for the purposes of this mandamus proceeding, the statistics presented by the defendants were accurate, thereafter filed with the court a short brief with its own statistical analysis of the material in the researcher's affidavit. This affidavit and the Government's representations, made in connection with the statistical analysis, furnished the basic evidentiary materials from which the district court drew the following conclusions of fact:

In trials of Black or Hispanic defendants over the past two years in Hartford, New Haven and Waterbury, 33 Blacks had been included in the final group eligible for jury selection, of which the Government had peremptorily struck 28, resulting in an "exclusion rate" of 84.8%. In cases involving White defendants, 49 Blacks were again in the "final group." The Government challenged 29 of these, resulting in an "exclusion rate" for this category (Blacks struck in the trials of White defendants), of 59.2%. Putting the two "exclusion rates" together (Blacks perempto-

rily struck by the Government in the trial of Blacks, White or Hispanics) yielded an overall "exclusion rate" of 69.5%.

On October 15, 1976, Judge Newman filed a memorandum and order. He decided "... that the pattern of government peremptory challenges of Black veniremen has now reached an excessive point that calls for the exercise of this court's supervisory power over the conduct of criminal trials in this District." He also said,

"... [T]he high rate of exclusion of Black veniremen and the fact that the rate is higher for trials of minority defendants than White defendants indicates that in a large number of instances Black veniremen were challenged because they were Black. Even in these instances, though the prosecutor's *intention* is clearly to exclude a person because he is Black, the prosecutor may have a *motivation* unrelated to any hostility toward Blacks. He may simply believe that a Black juror may be somewhat partial to a Black defendant." (Footnote omitted.)

The remedy which the district court ordered for the case presently before us, provided "... the appropriate remedy is to disallow the challenge of the four Black veniremen and resume the jury selection process with those four names included." As a prospective remedy in addition to the foregoing, the district court further ordered the United States Attorney's Office thereafter "... to maintain a record for each criminal trial of the number of Blacks included in the final panels against which peremptory challenges are exercised and the number of Blacks challenged peremptorily by the prosecutor without explanation."

We turn now to a consideration of the evidentiary material, principally the statistical data, presented by the Public Defender on which the factual conclusions of the

district court essentially rest. The district judge said, "... I ... accept as true the facts submitted in the ... [researcher's] affidavit." These facts are the basis for its ultimate holding that the present system and operation of the Government's peremptory challenges in the District of Connecticut produce an invidiously discriminatory pattern of Black exclusion from the juries in criminal cases in the United States District Court for the District of Connecticut. On review, it is the opinion of this court that the evidence submitted is inadequate in kind and quality and particularly in its relevancy and accuracy to support the conclusions reached as they bear upon the present case,⁴ which concerns the rights of one Black defendant and one White defendant on trial in the New Haven Division of the United States District Court for the District of Connecticut. What procedures were being used in selecting jurors in the Hartford Division at that time had no bearing or effect upon the defendants in the case before us.⁵

4 As the Supreme Court stated in *Swain v. Alabama*, 380 U.S. 202, 228 n. 32:

"... Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or on whether the prosecutor systematically strikes Negroes ..."

5 The New Haven Division of the United States District Court for the District of Connecticut, was created under that Court's Plan for the Random Selection of Grand and Petit Jurors, adopted June 21, 1968 in compliance with the Jury Selection and Service Act of 1968, 28 U.S.C. §1861, *et seq.*; and in 1973, after jury verdicts of guilty and convictions for bank robbery in the United States District Court in New Haven, Connecticut, in the New Haven Division, the defendant Jenkins and others claimed that they were denied a fair trial because the procedure used to select the jury panel resulted in discrimination against Negroes, and that there was a substantial disparity between the percentage of Negroes in the community and those on the jury list. They claimed that the disparity of 2-15% or 5-3 violated the Act of 1968

In gathering the evidentiary material having to do with the statistics out of which the facts of the case are found, however, the researcher who marshalled the figures, compiled the information from the jury lists of the Hartford and New Haven Divisions over a two-year period, 1974-76. The result of making a composite of these two Divisions was to make a survey which was accurate for neither the New Haven Division nor the Hartford Division. This merger of statistics and other facts persisted throughout and were instrumental in the formulation of the court's conclusions, even though the instant case is being tried only in the New Haven Division. Of course, several groups of statistics and descriptions of relevant cases and their significant features were separately discussed as matters occurring in the Hartford Division and likewise some matters occurring in the New Haven Division were separately mentioned, but the district court's conclusions and ultimate ruling were based upon the combined studies of both divisions. This course was adopted by the Federal Public Defender for the purpose of strengthening the charge against the office of the United States Attorney for the District of Connecticut that it had exercised its peremptory challenges with the purpose of invidiously discriminating against the use of Black persons as jurors.

and their constitutional rights, and should have been compensated for by selecting jurors from other sources in addition to the voting lists. Judge Newman, the district judge, found the disparity was 6%—3% between the census figures and the voter registration figures for the New Haven Division community and a correction would add only 1 additional Black to 50-60 veniremen which was not substantial enough to deprive the defendants of their rights. On appeal this court affirmed, *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974), and approved the jury lists and panels selected through the procedures adopted by the United States District Court for the New Haven Division pursuant to the Plan, and there has been no showing in the present action which calls for a different result.

Although the principal issue, raised by this petition for mandamus, concerns the Government's use of its peremptory challenges, sight must not be lost of the fact that it arises out of a federal trial of one Black and one White defendant in the New Haven Division of the United States District Court for the District of Connecticut. This motion is concerned with the rights of these defendants in having a fair and impartial jury and one which represents a fair cross-section of the community. That "community" for the purpose of selecting the jury is the New Haven Division and the court is concerned with the procedures used in that Division for jury selection in the cases of these two accused. By using the present case as the vehicle for an attack upon the United States Attorney's use of peremptory challenges and by proceeding from the recognition of the fact that the United States Attorney performs his functions and duties throughout the entire federal district, the Federal Public Defender has adopted the device of merging jury selection statistics as if juries were selected on a District-wide basis, which they are not. There has been continuously in operation, throughout the period of this case, the "Plan for Random Selection of Grand and Petit Jurors" which divided the District into three divisions, and that Plan is binding upon the district court. It is only the New Haven Division and its procedures for selecting the jury in this case which are relevant. By merging the New Haven Division statistics with those of the Hartford Division, the district court has, as mentioned above, greatly distorted and arbitrarily altered the statistics of the New Haven Division which are, as thus changed, made useless.

In the course of his opinion the district court judge hypothesized a statistically derived, expected rate of Black inclusion on juries, as an acceptable standard. The court said,

1567

"If 12 names are randomly drawn from a group of 28 that includes 2 Blacks, at least one Black would be included in the 12 approximately 68% of the time. This 68% is the expected frequency of juries that would include at least one Black out of the universe composed of final panels with the average number of Blacks that were present in the final panels in this District.⁶

6. Since the prosecutors can challenge peremptorily 6 of the 28 in these final panels, the average of 2 Black jurors per final panel would be reduced to 1.57 ($2 - (6/28 \times 2)$) if the prosecutors' peremptories were exercised neutrally as to race. If 12 names are drawn from a group of 22 (the initial 28 minus the 6 challenged by the prosecutor) that includes, on the average, 1.57 Blacks, the frequency with which at least one Black would be included in the 12 remains at approximately 68%."

Comparing the 68% expected rate with the actual rates in the separate Hartford and New Haven Divisions, it is abundantly clear that the rate experienced in the Hartford Division falls far below the standard, while the New Haven Division's performance substantially equates the standard, and any difference between the New Haven Division and the standard is *de minimis*. The figures are as follows:

The New Haven Division

In New Haven, out of 24 cases analyzed, there were 15 trials with final panels which included an average of 2 Blacks. Of those 15 trials, a Black juror served in 9 trials.

Taking into account the district judge's "expected" rate of 68%, of those 15 trials, Blacks *should* have appeared on juries in 10 cases. *In actual fact, they appeared on 9 juries.* (On one of the 15 final panels, 2 Black veniremen were challenged—one by the Government and the other by the defense. If either had withheld its challenge, the New Haven Division would have met the district court's standard of 68% or 10 trials.)

Translating these figures into percentages, 9 juries with one or more Black members out of 15 final panels, each of which includes an average of 2 Blacks gives a figure of 60% Black participation. The district court's expected percentage rate of Black "inclusion" is 68%.

The result of the above statistics is that the New Haven Division's record, the only one relevant for purposes of this case, compares *very* favorably with the standard hypothesized by the district court.

The Hartford Division

In Hartford, on the other hand, quite a different story is presented. Out of 47 trials analyzed in the Hartford Division, 23 final panels had an average of 2 Blacks per panel. Of those 23 trials, *only 4 had a Black on the jury*. Taking into account the district court's "expected" rate of 68%, *Blacks should have appeared on 15 juries*.

Again translating the Hartford Division figures into percentages so as to point up the comparison, 4 Hartford juries with a Black member out of 23 final panels including an average of 2 Blacks, result in a figure of 17% Black participation. This must be compared with the district court's 68% expected rate of Black "inclusion" on juries.⁶

⁶ The report on the Hartford Division about the number of Black veniremen who were peremptorily challenged by the Government in connection with several criminal trials presents those challenged as a fairly sizeable group of separate Black individuals, qualified for jury duty but cut off from the opportunity to serve because each had been struck by the Government. A study of the raw data, also furnished by the Federal Public Defender, discloses, however, that one of the group, S. W. Shepherd, was struck no less than six times by the Government, while two others in the group, M. Angus and W. Williams, were struck five times each. Assuming that the researcher's statistical analysis counted each Government peremptory challenge as striking a qualified potential Black juror and disregarding the fact that the same individuals were being challenged several times, it appears, in effect, that three Black veniremen were single-handedly responsible for no less than 16 peremptory chal-

While for several centuries in Anglo-American law inquiry into the reasons prompting an accused defendant to exercise a peremptory challenge have been barred and foreclosed and, likewise in this country for more than a century, such an inquiry or investigation into the reasons inducing a peremptory challenge by the prosecutor has also been precluded, the Supreme Court decision in *Swain v. Alabama*, 380 U.S. 202 (1965), though it strongly reiterates the strictures against compelling an inquiry or disclosure of reasons or circumstances prompting or inducing the exercise of a peremptory challenge, 380 U.S. at 220, in Part III of the court opinion, indicates that circumstances *might* exist under which interrogation of a prosecutor as to the reasons for his long, consistently repeated peremptory challenges, exercised solely against Black veniremen to exclude them from sitting on a jury, *might* be pursued. Suffice it to say that in this case the defendants have not shown, by the kind, quantity and quality of evidence which is necessary to sustain the very heavy burden of proof which rests upon them, that they were deprived of due process by the procedures used in selecting a jury for their trial in the present case. Nor under the circumstances did the defendants under any existing law have the right to inquire into and interrogate the prosecutor about his reasons for peremptorily challenging the four Black veniremen in the jury pool. *Swain v. Alabama, supra*, is the governing authority on this matter. In that case the Black defendant challenged the trial jury venire and the trial jury subsequently drawn from it, because the prosecutor's six peremptory challenges removed the only available Black members of the venire summoned in the case. In evaluating

lenges against Blacks in the Hartford Division. This counting of the same individuals several times, obscures the reliability and accuracy of the claimed facts and injects confusion into the real significance of the statistics.

the Fourteenth Amendment challenge against the prosecutor's striking of the six Black veniremen in *Swain*, the Court thoroughly reviewed the history and development of the peremptory challenge system and stated, as its basic holding:

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." 380 U.S. at 220.

In inviting the United States Attorney in the present case, therefore, to provide the court with a "nonracial" reason for the exercise of his four peremptory challenges against Black veniremen, the district judge erred with respect to *Swain's* standards in two respects: (1) by asking for a reason; and (2) thereby potentially subjecting the Government's exercise of its peremptory challenges to the court's control.

In Part II of the majority opinion in *Swain*, the Court discussed other facets of the nature and function of peremptory challenges, principally in the course of deciding the petitioner's claims that the prosecutor exercised the State's peremptory challenges for the purpose of excluding Negroes from serving on petit juries and for that reason the trial jury array should be stricken. The Court said,

"The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."' *In re Murchison*, 349 U.S. 133, 136. Indeed

the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause. Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hayes v. Missouri*, 120 U.S. 68, 70.

... [The peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . [V]eniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and

traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. . . .

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. . . ." 380 U.S. at 219-222. (Footnotes omitted.)

The Supreme Court affirmed the action of the State courts in denying the defendant's motion to strike the trial jury array.

In Part III of the Supreme Court's opinion in *Swain*, it engaged in an abstract discussion of how the Court *might* deal with a situation described by the petitioner and claimed by him to have been what actually had occurred in the trial of his case as an example of the historic characteristics of jury trials as they were in Talladega County from 1950 to 1965. In short, the petitioner in *Swain* argued that,

"... [N]ot only were the Negroes removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases pros-

ecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification." 380 U.S. at 222-223.

In speculating on looking into the prosecutor's responsibility for such a state of affairs the Court commented that it would reject the wooden application of various tests devised primarily to determine racial discrimination on the part of jury commissioners who represent the State in quite a different role from that of a prosecutor or defense counsel in exercising peremptory challenges. 380 U.S. at 226-27. The Court went on to say:

"But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. This is the teaching of *Hernandez v. Texas*, 347 U.S. 475; *Norris v. Alabama*, 294 U.S. 587; *Patton v. Mississippi*, 332 U.S. 463. We see no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor for many years is said to be responsible for this practice and is quite available for questioning on this matter." 380 U.S. at 227-28. (Footnote omitted.)

It appears that such an inquiry, however, might only be triggered by proof of a purposeful exclusion of Blacks

from juries over a substantial period of time. In *Swain* the Court said shortly preceding the above quotation:

"... [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify." 380 U.S. at 223-224.

The wording of Part III of the opinion does not decide or pretend to decide the hypothetical question presented by the petitioner, which could not be decided by the Court because the issue was not presented by the record. Justice Harlan's concurring opinion (380 U.S. at 228) makes this explicitly clear. At best, it is an educated guess as to the position that the majority of the Court would probably

take if the same question, supported by a record, came before it. Such an occurrence is, of course, not possible. It is, however, interesting to note what circumstances the dissenters in *Swain* felt would justify breaching the otherwise impenetrable wall of non-disclosure of reasons which prompt a peremptory challenge. In the dissenting opinion written by Justice Goldberg, he said,

"... [W]here, as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out; that the State, under our settled decisions, is then called upon to show that such exclusion has been brought about 'for some reason other than racial discrimination,' *Patton v. Mississippi*, *supra*, at 466; and that the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system to prevent all Negroes from ever sitting on any jury. Such a holding would not interfere with the rights of *defendants* to use peremptories, nor the right of the State to use peremptories as they normally and traditionally have been used.

It would not mean, as the Court's prior decisions, to which I would adhere, make clear, that Negroes are entitled to proportionate representation on a jury. *Cassell v. Texas*, *supra*, at 286-287 (opinion of Mr. Justice Reed). Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to

question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection." 380 U.S. at 244-245. (Footnote omitted.)

The principal difference between the majority and the dissent is that the former found that the record of the case did not present the question of invidious exclusion from jury service because of race, which the majority postponed until another day, while the latter found that the case presented "a clear record of jury exclusion because of race." Neither suggested or implied that the majority or dissenters favored opening a breach in the protective wall surrounding the exercise of a peremptory challenge for such inconclusive, confusing and unpersuasive reasons as those claimed under the circumstances of the present case.

As the evidence in this case is presented entirely on court or other official records and on affidavits, the reviewing court is in as good a position as was the trial court to pass upon matters of weight and credibility.

We are not satisfied that there is a persuasive showing that the prosecutor, in connection with the present case, had either the motivation or the intention, invidiously to exclude Black persons from serving on juries in the New Haven Division of the United States District Court for the District of Connecticut. What reasons were volunteered for the peremptory challenges by the prosecution were not "wholly unrelated to the outcome of the particular case on trial," *Swain, supra*, 380 U.S. at 224, and "[t]he presumption in any particular case must be that the prosecutor is using the . . . challenges to obtain a fair and impartial jury to try the case before the court." 380 U.S. at 222. As the

trial court noted, "the prosecutors honestly believed that the striking of Black veniremen would lessen the risk of bias in favor of the defendant and thereby increase the likelihood of a bias free jury." A prosecutor's opinion that particular veniremen are likely to base their conclusions as jurors on emotional factors such as fear, hate, or sympathy or pity rather than upon the evidence in the case in the light of the court's instructions of law, as it is their duty to do, is not an act of invidious racial discrimination. In fact, both the legislative history, 1968 U.S. Code Congressional and Administrative News 1794-95 (90th Cong. 2nd Sess.) and *Swain* make it clear that peremptory challenges may be exercised for purely subjective reasons, "which may very well be imagined or incorrect." Far from seeking to prevent all Blacks from ever sitting on any jury or to exclude all Blacks, qualified to serve as jurors, from serving on juries in civil or criminal cases or to confine them to token representation, the Government's Supplemental Response to the Respondent's statistics, which assumed their accuracy, contended that the adult Black population of Connecticut is 5% of the total, and Blacks constitute 3.15% of the jury lists.⁷ They constitute 2.11% of the jurors, and they have served on cases with Black defendants and cases with White defendants. There is, therefore, a disparity of 2.89% which is far below the 10% figure of which the Supreme Court said in *Swain*, "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much

⁷ In a footnote to the Affidavit submitted to this court, the district judge characterized the origin and relevancy of the 3.15% figure as "somewhat obscure." The figure was derived by establishing the number of Blacks included in general arrays, the total number of people included in those same arrays, and determining the percentage of Blacks in the total. The raw data for this computation came from defendants' figures, as pointed out by the Government in its Supplemental Response.

as 10%." 380 U.S. at 208-209. Moreover, on the defendants' statistics, of the 71 jury trials in criminal cases in the Hartford and New Haven Divisions, during the period of the study (exclusive of the present case) Blacks were members of jury panels 17 times and an alternate once. There has been no finding that there was a "racist" plan or purpose involved in the exercise of peremptory challenges by the Government.⁸ Apparently two of the Assistant United States Attorneys in the District of Connecticut are themselves Black.

We conclude that the deprivation of due process claims made by the defendants in this case have no support in law nor do the facts alleged have support in the evidence.

⁸ Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. If, for example, a defendant knows or has a strong suspicion that a particular venireman is hostile to him or believes the venireman has strong or militant views which would make it unlikely, in spite of the court's instructions, that the venireman would give fair and impartial consideration to the case, and yet the defendant does not have available sufficient evidence to prove these disqualifications on a challenge for cause, he can solve the problem with a peremptory challenge. The same considerations apply to a plaintiff or a prosecutor. Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges; and Blacks and other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial.

It is the opinion of the court that the petition for mandamus should be granted, ordering the rulings of the district court which directed that the names of the four challenged veniremen be restored to the final panel in this case be vacated and set aside. Likewise, this court orders that the direction by the district court to the United States Attorney to maintain statistics on the peremptory challenges by the Government and to report them to the Federal Public Defender where they would be available to the public also be vacated and set aside.

There is no authority for such modifications of the jury selection process, which was by formal vote, adopted by the district court, sitting in banc, and which was subsequently approved by the Council of the Second Circuit. The Federal Rules of neither Civil nor Criminal Procedure authorized these measures which violate the provisions of 28 U.S.C. §1861, *et seq.*

In the present case the novel and drastic remedies prescribed by the district judge, require that this court invoke its power under the All Writs Act, 28 U.S.C. §1651(a), because of the unprecedented assumption of power implicit in decreeing those remedies. *DeBeers Consolidated Mines Ltd. v. United States*, 325 U.S. 212, 217 (1945). This has created exceptional circumstances calling for the exercise of supervisory power of this court over the district courts to insure "proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957).

Will v. United States, 389 U.S. 90 (1967), is not to the contrary. In *Will*, the Supreme Court denied mandamus of a trial court's interlocutory order in a criminal case, noting the strong judicial and legislative policies against Government appeals in criminal cases, which could not be controverted by a liberal use of mandamus as a "substitute

for appeal," 389 U.S. at 96-97. The Court did, however, acknowledge the "vital corrective and didactic function" of mandamus and also wrote:

"This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to institute a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, *Ex parte United States*, 242 U.S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense." 389 U.S. at 97-98.

See also, Note, *Supervisory and Advisory Mandamus, Under the All Writs Act*, 86 Harvard L. Rev. 595, 622 (1973) ("It should be clear, however, that the [Will] case . . . does not represent an invalidation of uses of supervisory mandamus authorized by the model described above; on the contrary, it reaffirms the validity of those uses.")

This court has already concluded that the district court's findings of fact and conclusions of law in this case were in error and, in view of its abrupt departure from the statutes and rules, as well as from the District's own Plan for the Random Selection of Grand and Petit Jurors, it is one of those "extraordinary causes" for which "extraordinary

remedies" such as mandamus are appropriate, *Ex Parte Fahey*, 332 U.S. 258, 260 (1947), because the district court's opinion cannot but have an immediate and continuing detrimental impact on the administration of criminal justice in the District of Connecticut. *United States v. Lasker*, 481 F.2d 229 (2d Cir. 1973), cert. denied, 415 U.S. 975 (1974); *United States v. Weinstein*, 452 F.2d 704 (2d Cir. 1971), cert. denied sub nom *Grunberger v. United States*, 406 U.S. 917 (1972).

Among other things it is likely to bring about interminable delays in criminal trials as the result of constant defense challenges to arrays and final panels every time a Black is peremptorily challenged by the United States Attorney's office or in case no Black happens to be drawn on an array or final panel.

The petition for mandamus is granted and the writ may issue accordingly.

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

It is so ordered.

1582

480-1-27-77

USCA-4221

MEILEN PRESS INC., 445 GREENWICH ST., NEW YORK, N. Y. 10013, (212) 966-4177

219

United States District Court
District of Connecticut
FILED AT NEW HAVEN

March 14, 1977
Sylvester A. Markowski, Clerk

By: [Signature]
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

-VS-

MARGARET LEE ROBINSON

CRIMINAL NO. N-76-63

MOTION TO DISMISS

The defendant, Margaret Lee Robinson, hereby moves to dismiss the present indictment on the ground that a subsequent trial for the same offense which was mistried on March 7, 1977, will place this defendant twice in jeopardy of losing her liberty and therefore a subsequent trial must be barred by the Fifth Amendment's proscription against double jeopardy.

THE DEFENDANT
MARGARET LEE ROBINSON

By: [Signature]
ANDREW B. BOWMAN
FEDERAL PUBLIC DEFENDER
770 Chapel Street
New Haven, Connecticut 06510
Attorney for the Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

VS. : CRIMINAL ACTION NO. N-76-63

PATRICIA SAVERESE :

MOTION TO DISMISS
ON GROUNDS OF DOUBLE JEOPARDY

The defendant Patricia Saverese respectfully moves to dismiss the Indictment for the reason that her continued prosecution thereunder will place her twice in jeopardy in violation of the Fifth Amendment to the United States Constitution. In support of this motion, the defendant represents as follows:

1. A jury of twelve and two alternates was sworn in this case on November 29, 1976. Jeopardy attached at that time.
2. Subsequently, the Court of Appeals ordered the two black persons on that jury removed from it.
3. On March 7, 1977, over the defendant's objection, this Court declared a mistrial and dismissed the entire jury described above.
4. There was no good reason for the mistrial described above, because the remaining twelve persons from the original fourteen on the jury were available for service.
5. Placing this defendant on trial before another jury would place her twice in jeopardy in violation of her rights protected by the Fifth Amendment to the United States Constitution.

THE DEFENDANT, PATRICIA SAVERESE

BY

JOHN R. WILLIAMS
265 Church Street
New Haven, Connecticut 06510
Her Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

V.

MARGARET LEE ROBINSON
and PATRICIA SAVARESE

CRIMINAL NO. N-76-63

RULING ON DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss the indictment on the ground that their prosecution is barred by the double jeopardy clause of the Fifth Amendment. The novel context in which this claim arises requires detailed explanation of the facts.

On June 21, 1976, jury selection commenced. In the course of that process the defendants objected to the Government's use of four of its seven peremptory challenges to strike from the jury panel the only four Black members of that panel. The case was continued to permit the defendants time to present statistical data in support of their attack on the Government's use of peremptory challenges. On October 15, 1976, this Court sustained the defendants' objection, and ordered that jury selection continue, from the point at which it had been interrupted, with three of the four Blacks who had been challenged included in the group from which the final selection would be made. The fourth Black had been excused for cause by agreement. On November 29, 1976, jury selection resumed. A jury of twelve and two

alternates was selected and sworn. Two of the Blacks became members of the jury of twelve, and one remained in the jury panel along with the only two other veniremen who were left.

On January 25, 1977, upon petition of the Government, the Court of Appeals granted a writ of mandamus, in effect reversing this Court's ruling of October 15, 1976. United States v. Newman, ___ F.2d ___ (2d Cir. Jan. 25, 1977).

On February 16, 1977, the Court of Appeals issued its mandate, which was received in this Court on February 23, 1977. The mandate directed further proceedings in accordance with the opinion of the Court of Appeals. That opinion concluded as follows:

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

On March 7, 1977, this Court held a hearing, with defendants and their counsel present, to afford defendants the opportunity to make the election specified in the opinion

of the Court of Appeals. The Court first ascertained that counsel understood the two available choices of a reconstituted jury or a mistrial and had discussed them with their clients. Counsel for both defendants stated that they objected to both the options described by the Court of Appeals. Their preference was to proceed with the jury as originally selected on November 29, 1976.

Counsel for defendant Savarese also suggested a slight variation of the first choice described by the Court of Appeals. As he viewed the matter, "The Court of Appeals has directed only that the two black people be stricken, which would leave a jury of twelve with no alternates." (Tr. 5). As became clear in further colloquy, his suggestion was that the two alternates replace the two Blacks on the jury of twelve, and that trial commence before a jury of twelve without any alternates. Of course, it is clear from the Court of Appeals opinion that it did not direct "only that the two black people be stricken." The first option outlined by the Court of Appeals also included a requirement "that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel." Nevertheless, this Court explored with counsel for Savarese the possibility of modifying the first option by dispensing with the need for alternates. The Court told counsel that this could be done only if the need for two alternates were eliminated by an agreement to accept a jury of ten in the event that two of the twelve became ill or

otherwise incapacitated (Tr. 7). Counsel for the State expressed the view that there was no "manifest necessity" for doing anything other than proceeding with "those remaining twelve," i.e., the 10 Whites originally selected plus the two White alternates (Tr. 11). This Court took the position that while there were no special circumstances to indicate that the need to substitute alternates for regular jurors would arise during the trial, a court need not take the risk of such an eventuality. After all, if counsel was so confident that the trial could be completed without the need for using alternates, it is hard to see why he could not accept the Court of Appeals' first choice, under which the two new alternates would never participate in deliberations unless one of the jury of twelve became incapacitated. This Court made clear to counsel that while there was no obligation to accept a jury of less than 12, counsel's suggestion of dispensing with alternates would not be accepted unless there was agreement to a jury of ten in the event two jurors became ill or otherwise incapacitated. Counsel rejected this condition (Tr. 7). That left solely the two options specified by the Court of Appeals.

This Court then specifically asked both counsel whether they wished to elect the first choice. Before doing so, the Court made clear to counsel the inevitable consequence, under the mandate of the Court of Appeals, of a decision not to accept the first choice:

If that procedure is not elected, in effect, while I appreciate that you don't view it this way, but, in effect, you're making the

second choice, because you only have two choices.

* * * * *

If you elect the first choice, that's what we will do. If you don't elect the first choice, the inevitable consequence of that -- and you should be clear in your mind that you know it before you make your decision about electing the first choice -- the inevitable consequence is the second choice. Whether you view it as a choice or not is another matter, but the reality is there are only two choices.

If you accept the first choice, that's what we will do. If you decline to accept the first choice, or even stand mute, if you don't elect the first choice, that will have the effect and will be treated by me as an election of the second choice, and I will then follow the Court of Appeals decision and declare a mistrial and proceed to new jury selection. (Tr. 9, 10).

Both counsel acknowledged that they understood the choices as outlined by the Court (Tr. 10, 11), and both counsel rejected the first choice of a reconstituted jury (Tr. 11, 12). The Court then raised the possibility of a waiver of jury trial, an option both counsel rejected (Tr. 16). At that point, the Court declared a mistrial (Tr. 17). Both counsel then requested a brief continuance to submit written motions to dismiss on the grounds of double jeopardy.

At the outset, there is the distinct possibility that the propriety of declaring a mistrial and proceeding to select a new jury after the defendants had declined to elect the first choice described by the Court of Appeals has already been established by the Court of Appeals as the law of this case. The Court of Appeals outlined in detail the

defendants do not claim that this procedure was not strictly followed. It seems evident that the Court of Appeals was aware of a potential double jeopardy objection, since such was mentioned in the November 29, 1976, proceedings in this Court to which the Court of Appeals specifically referred. If not technically the law of this case, the Court of Appeals decision is surely a commanding precedent, and a district judge to whom a writ of mandamus has been issued is understandably reluctant to think that a Court of Appeals has instructed him to act in violation of the Constitution.

Even if the matter is considered as an open question, the double jeopardy claim is without merit. The pertinent standards have only recently been expressed and applied by the Court of Appeals. United States v. Grasso, ___ F.2d ___ (2d Cir. Mar. 9, 1977). A double jeopardy claim is waived if the defendant either moves for a mistrial or consents to a declaration of a mistrial made on the court's own motion.

Unquestionably neither defendant moved for a mistrial. And it is equally clear that both expressed their opposition to the grant of a mistrial. But it does not follow that they have not nonetheless impliedly consented to a mistrial under the circumstances of this case. They were clearly advised that, under the mandate and opinion of the Court of Appeals, their failure to elect the first choice offered by the Court of Appeals would result in a mistrial. They were told:

I understand that, in terms, you're not moving for a mistrial, but it's also clear that there are only two choices, and so the

rejection of the first choice is inevitably a reluctant, and perhaps unwilling, acceptance of the second choice. The fact that you don't say you like it or say you move for it doesn't make it any the less the inevitable alternative to your rejection of the first choice. (Tr. 14).

There is no requirement that consent, to be valid, be accompanied by happiness. When the defendants rejected the first choice, knowing that the only alternative was a mistrial, they gave their consent to a mistrial in an entirely realistic sense.

The matter might have been clearer if this Court had reversed the order of the options and asked the defendants whether they wished to elect a mistrial, knowing that failure to elect that choice would inevitably lead to reconstitution of the jury. Understandably, this Court preferred to proceed in strict accordance with the Court of Appeals' mandate and opinion, which had specified giving defendants the choice of reconstituting the jury, and requiring a mistrial if that choice were not accepted. But a semantic difference in the way the choices were put should not obscure the reality of what occurred. The defendants knew their action in declining the first choice would produce a mistrial.

The variation suggested by counsel for Savarese does not alter the situation. First, that option was not specified by the Court of Appeals, and hence may not have been available, even if all parties consented to it. Second, it was not the result that counsel wanted. As counsel for Savarese stated, in reference to replacing the two Blacks on

the jury with alternates and proceeding without new alternates, "We are not asking that, because we believe we should be tried by the jury as presently constituted. However, it's our position that that is the only possible alternative which would not violate our clients' right to be protected against double jeopardy." (Tr. 5). Even if this variation was counsel's second choice, there was no entitlement to insist that trial commence without selection of alternates. A court is entitled to the normal assurance that the usual risks of jury incapacity are guarded against either by having two alternates or by agreement to permit a verdict of ten jurors. See Fed. R. Crim. P. 23(b). Moreover, the two remaining veniremen, whom Savarese preferred not to see installed as alternates, are the same persons who would have been chosen as alternates if the Government's peremptory challenges had not been initially disallowed.

If the circumstances of this case do not establish implied consent, retrial is still proper if there was a "manifest necessity" for the mistrial or "the ends of justice would otherwise be defeated." United States v. Grasso, *supra*, quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

From the perspective of this Court there surely was a manifest necessity to declare a mistrial after defendants declined the first option specified by the Court of Appeals. It was necessary to comply with the mandate of the Court of Appeals. Moreover, it was not appropriate, as is usually the

case, United States v. Grasso, supra (slip op. 2255), for this Court to consider procedural alternatives to a mistrial, since the mandate of the Court of Appeals specified the only alternative that was available.

Even if the mandate had not been so specific, the ends of public justice would otherwise have been defeated had a mistrial not been declared. It would surely not have been consistent with public justice to force upon the defendants the reconstituted jury, even though they would not have had any legally valid objection to that jury. It would have been, after all, a jury composed of the identical jurors and alternates who would have been chosen had the Government's peremptory challenges initially been allowed. Surely defendants have no complaint that the very option they rejected was not forced upon them. Proceeding without any alternates would also not have been consistent with public justice, especially since defendants had no legally valid objection to the two veniremen who would have become alternates. There was surely no occasion to consider dismissal, not only because the Court of Appeals had precluded such an option, but also because the defendants, even though technically in jeopardy when the first jury was sworn, Downum v. United States, 372 U.S. 734 (1962); Newman v. United States, 410 F.2d 259 (D.C. Cir. 1969), had not endured the time or expense of a single minute of trial.

For all of these reasons, the motion to dismiss is denied. Jury selection will occur March 30, 1977. Since

defendants' counsel have indicated their intention to seek review of this ruling in the event it is adverse, see United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976); United States v. Barket, 530 F.2d 181 (8th Cir. 1976); United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), the jury will be selected but not sworn until such time as the Court of Appeals has had an opportunity to consider an application for a stay of further proceedings, provided such application is filed within three days of this Ruling.

Dated at Hartford, Connecticut, this 25th day of March, 1977.

Jon O. Newman
Jon O. Newman
United States District Judge

77-8155

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,
-VS-
MARGARET LEE ROBINSON,
APPELLANT.

DOCKET NO.

MOTION FOR STAY OF PROCEEDINGS TO ALLOW COURT OF APPEALS
TO RULE UPON PROPRIETY OF DISTRICT COURT'S DENIAL
OF APPELLANT'S MOTION TO DISMISS THE INDICTMENT
ON FIFTH AMENDMENT DOUBLE JEOPARDY GROUNDS

The appellant, Margaret Lee Robinson, hereby moves this Court for an order staying further proceedings in the United States District Court for the District of Connecticut in order to allow the Court of Appeals to rule upon the propriety of the district court's denial of appellant's motion to dismiss the indictment on Fifth Amendment Double Jeopardy grounds.

1. Relief is sought under Rule 27(a) of the Second Circuit's rules containing special provisions for summary disposition of stay applications where a showing of urgency is made.

2. A notice of appeal from the district court's order denying appellant's motion to dismiss the indictment was filed in the district court on March 29, 1977, Motion App. p. 1.

3. This appeal should be heard by the Second Circuit prior to the commencement of a second trial under United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976), and United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), since the issue presented by this appeal deals with the question of the appellant's Fifth Amendment right not to be twice placed in jeopardy.

4. If a stay of proceedings is not granted, pending determination of the Double Jeopardy issue by this Court, the second trial will commence on April 11, 1977.

Chronology

a. On November 29, 1976, a jury of twelve and two alternates was impanelled and sworn.

b. On that date, the Second Circuit stayed further proceedings pending a ruling on the government's petition for writ of mandamus in United States v. Newman, ___ F.2d ___ (2d Cir. January 25, 1977).

c. On January 25, 1977, the Second Circuit issued the writ of mandamus with the mandate issuing on February 16, 1977, and being received in the district court on February 23, 1977, Motion App.p.2

d. The mandate directed further proceedings in accordance with the opinion of the Court of Appeals which opinion concluded as follows:

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present

jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

e. On March 7, 1977, Motion App. p. 26, a hearing was held in the district court at which time the appellant objected to proceeding with a jury from which two black jurors had been discharged by the Court of Appeals. The district court then declared a mistrial over appellant's objection.

f. With leave of court, appellant filed her motion to dismiss the indictment and supporting memorandum on March 14, 1977, Motion App. pp. 46-52, on the ground that a second trial would place her in jeopardy twice of losing her liberty in violation of the Fifth Amendment.

g. On March 28, 1977, the district court filed its order denying appellant's motion to dismiss the indictment, Motion App. p. 65, and granted appellant until March 31, 1977, to file her application for a stay of proceedings.

h. On April 11, 1977, a jury will be selected, and a trial will commence pending the Second Circuit's determination of the Double Jeopardy issue presented in this appeal.

5. Unless this Court grants a stay, a constitutional right of appellant will be irretrievably lost. See United States v. Alessi and United States v. Beckerman, supra.

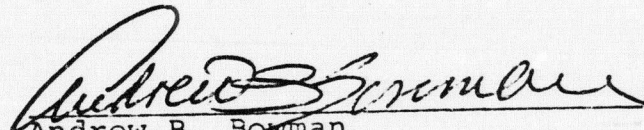
6. A stay will protect this Fifth Amendment right without any prejudice to the government.

7. It is appellant's belief that under the precedent of the Supreme Court, the appellant is likely to succeed on the merits since there was no manifest necessity for the partial or total discharge of the November 29, 1976 jury. See United States v. Dinitz, ____ U.S. ____, 96 S.Ct. 1075 (1976); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963); Simmons v. United States, 142 U.S. 148 (1891); United States v. Perez, 9 Wheat. 579, 6 L.Ed. 165 (1824).

For these reasons, it is respectfully requested that a stay be granted during the pendency of the appeal from the district court's denial of appellant's motion to dismiss the indictment on Fifth Amendment Double Jeopardy grounds.

Respectfully submitted,

Dated: March 30, 1977


Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
(FTS) 8-643-8148
Attorney for Margaret Robinson

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

-VS-

PATRICIA SAVERESE,

APPELLANT.

DOCKET NO.

MOTION FOR STAY OF PROCEEDINGS TO ALLOW COURT OF APPEALS
TO RULE UPON PROPRIETY OF DISTRICT COURT'S DENIAL
OF APPELLANT'S MOTION TO DIMSISS THE INDICTMENT
ON FIFTH AMENDMENT DOUBLE JEOPARDY GROUNDS

The appellant, Patricia Saverese, hereby moves this Court for an order staying further proceedings in the United States District Court of the District of Connecticut in order to allow the Court of Appeals to rule upon the propriety of the district court's denial of appellant's motion to dismiss the indictment on Fifth Amendment Double Jeopardy grounds.

1. Relief is sought under Rule 27(a) of the Second Circuit's rules containing special provisions for summary disposition of stay applications where a showing of urgency is made.

2. A notice of appeal from the district court's order denying appellant's motion to dismiss the indictment was filed in the district court on March 29, 1977, by this appellant and by Margaret Lee Robinson (Docket No. 76-3077), the co-defendant below.

3. This appeal should be heard by the Second Circuit prior to the commencement of a second trial under United States v. Alessi, 544 F.2d 1139 (2d Cir. 1976) and United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975), since the issue presented by this appeal deals with the question of the appellant's Fifth Amendment right not to be twice placed in jeopardy.

4. If a stay of proceedings is not granted, pending determination of the Double Jeopardy issue by this Court, the second trial will commence during the week of April 11, 1977.

Chronology

a. On November 29, 1976, a jury of twelve and two alternates was impanelled and sworn.

b. On that date, the Second Circuit stayed further proceedings pending a ruling on the government's petition for writ of mandamus in United States v. Newman, F.2d ____ (2d Cir. January 25, 1977).

c. On January 25, 1977, the Second Circuit issued the writ of mandamus with the mandate issuing on February 16, 1977, and being received in the district court on February 23, 1977.

d. The mandate directed further proceedings in accordance with the opinion of the Court of Appeals which opinion concluded as follows:

On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1977, to proceed with the present jury of three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

e. On March 7, 1977, Robinson Motion App. p. 26, a hearing was held in the district court at which time the appellant suggested proceeding to trial with the remaining twelve jurors, all of whom were in good health and available, and with no alternates. Although trial is expected to be brief, the district court rejected this suggestion and declared a mistrial over appellant's objection.

f. With leave of court, appellant filed her motion to dismiss the indictment and supporting memorandum, Motion App. p. 1, on the ground that a second trial would place her in jeopardy twice of losing her liberty in violation of the Fifth Amendment.

g. On March 28, 1977, the district court filed its order denying appellant's motion to dismiss the indictment, Robinson Motion App. p. 65 , and granted appellant until March 31, 1977, to file her application for a stay of proceedings.

5. Unless this Court grants a stay, a constitutional right of appellant will be irretrievably lost. See United States v. Alessi and United States v. Beckerman, supra.

6. A stay will protect this Fifth Amendment right without any prejudice to the government.

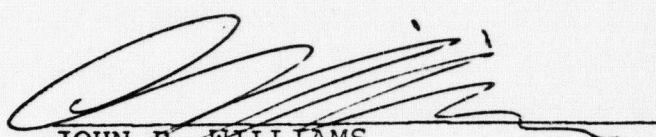
7. It is appellant's belief that under the precedent of the Supreme Court, the appellant is likely to succeed on the merits since there was no manifest necessity for the partial or total discharge of the November 29, 1976 jury. See United States v. Dinitz, ___ U.S. ___, 96 S.Ct. 1075 (1976); Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 34 (1963); Simmons v. United States, 142 U.S. 148 (1891); United States v. Perez, 9 Wheat. 579 6 L.Ed. 165 (1824).

For these reasons, it is respectfully requested that a stay be granted during the pendency of the appeal from the district court's denial of appellant's motion to dismiss the indictment

on Fifth Amendment Double Jeopardy grounds.

Respectfully submitted,

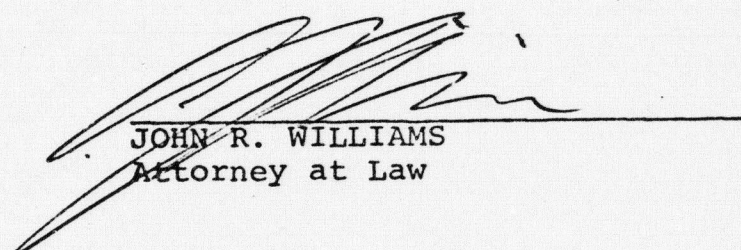
Dated: March 30, 1977



JOHN R. WILLIAMS
Williams, Wynn and Wise
265 Church Street
New Haven, Connecticut 06510
203-562-9931
Attorney for Patricia Saverese

CERTIFICATION

I hereby certify that copies of the foregoing Motion have been mailed to Michael Hartmere, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508; Andrew B. Bowman, Esq., 770 Chapel Street, New Haven, Connecticut; and Honorable Jon O. Newman, United States District Judge, Post Office Building and Courthouse, 141 Church Street, New Haven, Connecticut, this 30th day of March, 1977.



JOHN R. WILLIAMS
Attorney at Law

DOCKET NO. 77-8155

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
v.	:	DOCKET NO. <u>77-8155</u>
	:	
MARGARET LEE ROBINSON,	:	
	:	
Appellant.	:	

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR STAY OF PROCEEDINGS

The Government opposes Appellant's Motion for Stay of Proceedings to Allow Court of Appeals to Rule Upon Propriety of District Court's Denial of Appellant's Motion to Dismiss the Indictment on Fifth Amendment Double Jeopardy Grounds. The Government submits that the Appellant's claim that trial under this indictment would subject her to double jeopardy in violation of the Fifth Amendment to the United States Constitution is patently frivolous.

In this regard, the Government directs this Court's attention to the well-reasoned opinion of the trial court denying the defendants' motion to dismiss on grounds of double jeopardy. (See Appellant's Appendix, pp. 65-74).

Moreover, on November 29, 1976, the date on which the original jury was sworn in this case, the Government strenuously

argued against both the selection and the swearing of the jury. (Appellee's Appendix, pp. 1-37). At that time, counsel for both defendants urged the trial court to proceed with jury selection, despite the fact that it was known that there would be some delay due to Government counsel's trial schedule and further that the Government was seeking a writ of mandamus in this case. Now, the defendant Robinson attempts to argue that she has suffered the pains of jeopardy from that jury selection.

The opinion of this Court granting the Government's petition for a writ of mandamus concluded as follows:

"On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness."

United States v. Newman, ____ F.2d ____,
(2d Cir. Jan. 25, 1977).

The Government suggests that it is clear from the opinion

that this Court fully anticipated that this case would be promptly reassigned for trial in the event that the defendants refused to accept the original jury as modified by its opinion.

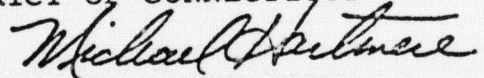
The options available to the defendants were thoroughly discussed with the defendants by the trial court on March 7, 1977, at which time the defendants objected to both options. The Government suggests (and the trial court so found in its opinion) that the conduct of the defendants on March 7, 1977 clearly amounts to an implied consent to the declaration of a mistrial. See United States v. Tateo, 377 U.S. 463, 467 (1964); United States v. Goldstein, 479 F.2d 1061, 1065-1068 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

Additionally, even if defendants' conduct on March 7, 1977 did not amount to implied consent to the declaration of a mistrial, surely there was a "manifest necessity" requiring the trial judge to declare a mistrial. See United States v. Grasso, ___ F.2d ___ (2d Cir. March 9, 1977). In this regard, the Government also relies on the opinion of the trial court. (Appellant's Appendix, pp. 72-73).

For all of the foregoing reasons, the Government suggests that the defendant's Motion for Stay of Proceedings should be denied on the merits.

Respectfully submitted,

PETER C. DORSEY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT


BY: MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

77-8155
A 89

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of April, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

Margaret Lee Robinson, Patricia Saverese,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

Margaret Lee Robinson
appellant/ ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated March 30, 1977 for a stay

be and it hereby is ~~granted~~ ~~XXXXXX~~ denied without prejudice to renewal before Honorable Jon O. Newman, District Judge.

It is further ordered that the appeal be and it hereby is set for argument during the week of April 11, 1977.

A. DANIEL FUSARO
Clerk

by
Edward J. Guardaro
Senior Deputy Clerk

* * *
BEFORE: ~~HON. JAMES L. OAKES~~
Circuit Judge
~~HON. CHARLES EDWARD WZANSKI, JR.~~

~~HON. JAMES S. HOLDEN~~
Circuit Judges
District ~~XXXXXX~~

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of April, one thousand nine hundred and seventy-seven.

United States of America,

Plaintiff-Appellee,

v.

Margaret Lee Robinson, Patricia Saverese,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

Patricia Saverese			
appellant	/	appellee	petitioner
		XXXXXX	respondent
by notice of motion dated March 30, 1977 for a stay			

be and it hereby is ~~granted~~ denied without prejudice to renewal before Honorable Jon O. Newman, District Judge.

It is further ordered that the appeal be and it hereby is set for argument during the week of April 11, 1977.

A. DANIEL FUSARO
Clerk

by Edward J. Guardaro
Senior Deputy Clerk

BEFORE: ~~HON. JAMES L. GARGES~~
Circuit Judge

~~HON. CHARLES EDWARD WYANSKI, JR.~~

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

VS.

MARGARET LEE ROBINSON and
PATRICIA SAVARESE

:

:

:

:

Criminal No: N-76-63

New Haven, Connecticut
November 29, 1976

B e f o r e: HONORABLE JON O. NEWMAN, U.S.D.J.

A p p e a r a n c e s :

FOR THE GOVERNMENT:

PETER C. DORSEY, Esquire
United States Attorney

and

MICHAEL HARTMERE, Esquire
Assistant United States Attorney
P.O. Box 1824
New Haven, Connecticut 06503

FOR THE DEFENDANTS:

ANDREW B. BOWMAN, Esquire
Federal Public Defender
770 Chapel Street
New Haven, Connecticut

JOHN R. WILLIAMS, Esquire
265 Church Street
New Haven, Connecticut

1 THE COURT: United States against Robinson and
2 Savarese.

3 MR. HARTMERE: We filed a motion for a continu-
4 ance, a writ of mandamus, which has been filed with the Second
5 Circuit this morning. We have been attempting to contact
6 Joseph Davies, who is the attorney from the Appellate Section of
7 the Criminal Division -- we have been unable to do so -- to
8 determine whether in fact it has been filed, but along with the
9 Government's petition for mandamus is a motion for a stay as to
10 this particular case as to final jury selection.

11 Again, we have attempted to find out if that has
12 been indeed signed by a Judge of the Second Circuit and we have
13 been unable to do so at this point.

14 The Government would move to continue the case
15 based on what I have represented as to what is contained within
16 the motion.

17 I understand that a copy of the petition for
18 mandamus and the motion for a stay was mailed to the Second
19 Circuit on Friday. It was supposed to be hand carried this
20 morning. Whether in fact both have been done, I am not sure.
21 At least a copy was mailed out Friday at the very least.

22 THE COURT: For a stay of what, of this case?

23 MR. HARTMERE: Yes, Your Honor, a stay of the
24 Court's order, both on this case and on the overall decision of
25 the Court.

1 Did Your Honor receive a copy of the materials?

2 THE COURT: That you sent to the Second Circuit?

3 MR. HARTMERE: Yes, they were sent from Washington.

4 THE COURT: Yes, I had that this morning. I am
5 not quite clear on the need for it. It says the Government
6 moves for a continuance to avoid the possible delay. How will
7 we avoid delay by delaying?

8 MR. HARTMERE: In the motion, Your Honor?

9 THE COURT: Yes.

10 MR. HARTMERE: Delay should the Government's
11 petition for mandamus be granted and should this motion for a
12 stay be granted, in fact this would be become moot I suppose,
13 this motion for continuance here. It may be moot at the
14 present time. We can't find that out.

15 I think if we go forward today and pick the
16 final panel and in fact the Second Circuit grants, or at least
17 hears our petition and grants the motion for a stay, then at
18 least as to part of the mandamus, that is as to this particular
19 case, the question is either mooted out or we have a serious
20 double jeopardy problem should the Second Circuit find in our
21 favor or grant the petition, and we will then be in a position
22 where we have a final jury impaneled and sworn with the Second
23 Circuit saying, possibly saying it shouldn't have been done
24 that way.

25 We will then not be in a position to pick a jury

1 in accordance with whatever they say because we will have a
2 jury.

3 THE COURT: Is the Government's view that
4 jeopardy attaches when the jury is impaneled?

5 MR. HARTMERE: I think that's from the case law,
6 Your Honor, when the jury is impaneled and sworn. Now, I
7 realize in this district we usually view it as when evidence is
8 presented, at least that's been the view in front of certain
9 Judges but I think from the case law it says when the jury is
10 impaneled and sworn jeopardy attaches.

11 THE COURT: Supposing we impanel them and don't
12 swear them until we are ready to present evidence?

13 MR. HARTMERE: Well, I think it would be a
14 fruitless exercise to do that at this point. In other words,
15 the reason that they wouldn't be sworn is to avoid any jeopardy
16 problems should the Second Circuit grant the petition whereas
17 there is really no need to do that at this point at any rate,
18 if we are not doing it in view of the forthcoming action of the
19 Second Circuit.

20 THE COURT: Well, except the array is here --
21 it's not really the array, it's that portion of the final panel
22 that's available for selection.

23 MR. HARTMERE: Your Honor, except for possibly
24 five of those people will be brought in as the jury on this case
25 at any rate so they will all be back again except for the extras
that we have.

1 THE COURT: Some of them will be back. What's
2 the reason for the delay, from either the date of the ruling,
3 which was October 15th, or the day when reconsideration was
4 denied, which was November 4th?

5 MR. HARTMERE: Well, this matter has been handled
6 by the Department, Your Honor, by the Appellate Section of the
7 Criminal Division.

8 They had the same problem that we have had. They
9 have had statisticians in Washington, we had none here, however,
10 their statisticians were in Washington and we had to transmit
11 the figures and basic statistics down to them. That's been an
12 ongoing procedure.

13 We anticipated that it would have been done at
14 least a week ago but they ran into further delay down there
15 themselves with their own statisticians and whatever else they
16 ran into. I don't know what problems they had but the petition
17 was not drawn here. It was drawn in Washington and that's the
18 reason for some of the time, at least.

19 THE COURT: Normally, when the Government seeks
20 mandamus in the course of a pending criminal case they do it
21 almost instantaneously. This is I would think a fairly
22 unusual delay in seeking mandamus of a ruling made in the course
23 of a pending criminal case.

24 MR. HARTMERE: The Government, Your Honor, to my
25 understanding, the U.S. Attorney cannot file a petition for

1 mandamus. It has to come with the approval of the Department.

2 THE COURT: I am talking about the Government,
3 not any particular branch of it, the Executive Branch.

4 MR. DORSEY: Perhaps I could comment on that.
5 We kept the Appellate Section of the Criminal Division of the
6 Justice Department apprised of what was going on during, through
7 the course of October, when other proceedings took place here,
8 and as the result of the November 4th ruling, when that was
9 communicated to the Department, it was communicated with a
10 recommendation from my office that a mandamus petition be sought.

11 They had to in Washington review all of the
12 documents which were sent down to them. There was apparently
13 within the Department itself a mix-up because, frankly, we had
14 to send about a week later, if I recall correctly, we had to
15 send the documents again because the Appellate Section lawyer,
16 who is responsible for the case, still didn't have it.

17 As soon as he reviewed the matter a communication
18 on mandamus was immediately approved out of the Criminal
19 Division going through the lawyer who had handled it originally,
20 through the head of the Appellate Section and the Criminal
21 Division Assistant Attorney General himself, if I understand
22 correctly, and it was communicated to the Solicitor General's
23 office.

24 No mandamus is authorized except with the specific
25 permission of the Solicitor General.

1 In the Solicitor General's office it was reviewed
2 again apparently at three levels. This is the process they go
3 through down there. As soon as the Solicitor himself authorized
4 a mandamus, then the preparation of the actual petition was
5 commenced in the Appellate Section.

6 That was done and the research that was involved,
7 both on the question of the propriety of the mandamus as well
8 as the merits of the challenge to the Court's order, required
9 considerable amount of research and additional statistical
10 analysis that was completed, if I understand correctly, on
11 Thursday of this past week, and the final form of the petition
12 was prepared on Friday and mailed out.

13 We have been pointing out to them the exigencies
14 of the circumstances here, including specifically the trial
15 schedule that Your Honor has been indicating all along.

16 I might say a concern that we have on the delay
17 issue that Your Honor raised earlier is the question of what
18 will transpire if the Court goes ahead and picks a jury today,
19 actually impanels it.

20 Whether they are actually sworn or not may not be
21 relevant to this question, but if they are actually picked and
22 then either the stay is granted or more importantly if the
23 mandamus is granted, then there is going to be a delay because
24 you will have to probably start the selection process all over
25 again, having picked a jury, and presumably see, though not

perhaps having sworn it, you may end up in a situation where we have to start all over again.

THE COURT: But I am not saving anything. If they tell me to start all over again, I will have to start all over again but if they don't tell me to start all over again, I would have unnecessarily delayed this trial.

MR. DORSEY: The point is if they tell you to go ahead with the trial you can do so if you have not picked the jury today. In other words, if part of the order, which is basically our concern at the moment, and that is the picking of the jury in the face of the Government having been in effect denied its peremptory challenges, at least three of them that were exercised, if the Court says the case can go forward, the case should go forward, but the case should go forward without the jury having been selected in the manner that the Court order encompasses, then that selection process could go forward at any time, but if the Court goes forward now and picks the jury, then with the peremptory challenges in effect having been invalidated, then the Court has to start all over again, whereas if you don't actually --

THE COURT: Is that inevitable? Supposing we picked a jury today and include for selection the disallowed challenges which are now three in number; is that correct?

MR. DORSEY: Yes, Your Honor.

THE COURT: So we are going to have -- I think it's nineteen people --

1 MR. DORSEY: I thought it was twenty-one with the
2 four and --

3 THE COURT: It was and now I think there is one
4 person unavailable from the original group. I think it's
5 nineteen which includes the three disallowed challenges.

6 (Discussion off the record.)

7 THE COURT: I want to be sure we are in agreement
8 on what the pertinent numbers of people are at the moment. I
9 think it's clear, but since it may affect the Government's
10 request for continuance, I want to be certain about it.

11 My understanding is that at the time we started
12 jury selection we had -- and at that time it will be recalled
13 we were anticipating a jury of twelve and five alternates, so
14 we endeavor to have seventeen names in the final panel after all
15 peremptories were used, and we ended up by my count with
16 seventeen plus the four Government challenges that were
17 excepted to.

18 That meant we had twenty-one people. By agreement
19 of all sides one of the questioned challenges was excused.

20 MR. BOWMAN: That's correct.

21 THE COURT: So that left us with seventeen plus
22 three questioned challenges, and then since then we have lost on
23 just personal reasons that have nothing to do with this litigation,
24 Mr. FitzSimmons and Mr. Swift is unavailable and apparently Mrs.
25 Barnick is unavailable, so we now have fourteen plus three

questioned challenges for a total of seventeen.

I suppose one possibility is, and at this stage we don't really need five alternates, so we don't anticipate the trial delay that we anticipated back in the summer of whenever it was when we started this proceeding, so normally we can pick twelve and two alternates. If we wanted to pick twelve and two alternates from the seventeen, the fourteen names selected might include some or all of the three questioned challenges.

I suppose it's possible that if the Government -- if the Court of Appeals issues any stay or wishes to issue any order affecting the composition of the jury in this case we could still proceed with the presentation of evidence, if it's the wish of the Court of Appeals.

In other words, if the Court of Appeals wants to sustain the Government's exercise of the challenge of those three people, excuse any of those three that are selected and substitute the three other names who would have been picked but for my disallowance of the Government challenges.

MR. DORSEY: That's true. The same basic thing could be accomplished, and this is the purpose of our motion in this particular respect, by just doing nothing today and holding the question of further jury selection proceedings in abeyance until such time as the Circuit Court makes a determination.

The point is that we would thereby preserve this

1 particular panel. My concern is that if you pick a panel of
2 twelve and two, and I think almost of necessity the highest
3 possibilities or probabilities are going to be that at least
4 one of the three is going to be in the twelve or the two.

5 If that happens and you have in any way deemed
6 to have tainted the jury that is selected, I don't see how you
7 can take somebody off and put someone else on.

8 THE COURT: If that's what the Court of Appeals
9 wants done they will tell me.

10 MR. DORSEY: What I am suggesting, it's easier
11 not to in effect include in either the twelve or the two any
12 one of the three that were challenged and wait to see what the
13 Court of Appeals does.

14 If the Court of Appeals says there is nothing to
15 be done and you go forward, then you can pick the twelve or the
16 two and no problem has developed. If you have already picked
17 the twelve and the two and if the Court of Appeals says that the
18 setting aside of the Government's peremptory challenges is
19 improper, then you get someone in the twelve of the two that you
20 then have to take out and the question comes down to whether or
21 not that would thereby require us to start all over again,
22 because if you select the twelve and the two, that is your jury.

23 THE COURT: What happens if you say it will be
24 difficult, I'm not quite so sure who it will difficult for.
25 But in any event let's suppose we pick a jury and the Court of

1 Appeals were to say, "We think the granting of the motion to
2 set aside the challenges was in error but it's too late for us
3 to do anything about it," what is the harm at that point?

4 MR. DORSEY: Well, the Court of Appeals on
5 either that ground or on another ground or a number of other
6 grounds I suppose could at this juncture say they are going to
7 do nothing with respect to the order that is entered insofar as
8 it applies to this case and merely deals with the broader
9 aspects of the ongoing requirements of the Government insofar as
10 your order is concerned, in which instance there is no harm if
11 one regards the jury selection as in effect having been properly
12 accomplished and the answer to the question really is whether
13 or not we should speculate at this juncture as to what the
14 Court of Appeals will do since, as I understand it, we are not
15 going to go forward with the actual trial of the case today,
16 and by simply delaying the selection of the twelve and the two
17 until you actually commence the trial itself with the
18 presentation of evidence, there was no harm done to anyone and
19 you preserve the selection of the twelve and the two without
20 having to get involved with the additional three who are the
21 subject of the peremptory challenges.

22 THE COURT: If we do delay we bring back some
23 people unnecessarily.

24 MR. DORSEY: You bring back three people un-
25 necessarily. That's why I called the Court to bring this to the

1 Court's attention on Friday .

2 THE COURT: I think it was on Wednesday before
3 the Thanksgiving Holiday.

4 MR. DORSEY: Right.

5 THE COURT: You bring them back unnecessarily,
6 that happens. You also avoid the opportunity to have a jury
7 finally picked and ready in the event both counsel who are now,
8 at least one defense counsel and the Government counsel are
9 engaged in another criminal case, as I understand it, but
10 criminal cases have a way of having uncertain futures, and for
11 all I know they may become available tomorrow morning.

12 MR. DORSEY: That's true.

13 THE COURT: I understand they don't expect to be.

14 MR. DORSEY: That's my understanding too. The
15 other thing is this, Your Honor. If the Court of Appeals rules
16 favorably on the Government petition insofar as it has appli-
17 cation in this case, then you don't have to bring the three
18 back because if the three are then by virtue of the prior
19 peremptories deemed excused, then you just simply will have to
20 bring back the twelve and the two and that's your jury for all
21 intents and purposes.

22 You go through the formality of pulling them out
23 of the hat --

24 THE COURT: What's the harm if ultimately some of
25 the challenged peremptories are seated in the jury and we go to

1 trial? I take it there is no change in the Government's
2 position from the time I inquired when the challenges were first
3 questioned by the defense counsel that the Government had
4 nothing to put on the record to indicate any other reason for
5 challenging them, there is no claim that we would be putting
6 into the jury box somebody who, for example, knows the defendant
7 or where there is --

8 MR. DORSEY: Those would be grounds for cause
9 that we would have brought to the attention of the Court.

10 THE COURT: I thought I afforded the Government
11 to go beyond challenges for cause and indicate whether there was
12 any other reason, frankly, any non-racial reason why they just
13 wanted to challenge somebody peremptorily other than challenges
14 for cause, and at that time there was no response.

15 MR. DORSEY: There are no grounds that the
16 Government has within the traditional concept of cause that the
17 Court could ask or could be asked to excuse those three with the
18 possible exception of the affect upon those three of the
19 attendant publicity that took place after the exercise of the
20 challenges and after the Court's order that was entered, but
21 it's my understanding that the Court has determined that that
22 was not the grounds for taking any further action at this
23 particular juncture.

24 MR. BOWMAN: That assumes none of the other jurors
25 would have been offended who were no black.

1 THE COURT: I have not had any motion as to
2 publicity, if that's what this is.

3 MR. DORSEY: That was something we discussed in
4 the office and I don't know whether Mr. Hartmere has brought
5 that to the Court's attention with the request for the excuse.

6 MR. HARTMERE: That would probably be done, Your
7 Honor, by the final jury selection.

8 THE COURT: What would be done?

9 MR. HARTMERE: We would ask for a voir dire by
10 the Court or counsel as to each member of the jury or the
11 remaining seventeen as to whether they have in fact read about
12 this case or seen it on television or radio and the publicity
13 has been significant.

14 It was put on the record of the front page of the
15 New Haven Register twice; Hartford twice; lead story on the
16 Channel 3 News; and there are various other publications, so
17 prior to final selection we would ask for a voir dire on that
18 to see if any of the seventeen should now be challenged for
19 cause.

20 Our contemplation that we would not be able to
21 make that without the Court affording or at least inquiring of
22 the jurors as to whether there is any basis in fact for it.

23 THE COURT: For cause based on their reading
24 about a ruling?

25 MR. DORSEY: The ruling obviously, I am frank to

1 say, has had connotations in many quarters, as has been communi-
2 cated to me, as to suggest a posture of the Government, if it
3 occurred to one of these three in particular or others, as Mr.
4 Bowman quite properly points out, could very well involve a
5 bias that might in any particular instance be a basis for
6 excuse for cause.

7 If some one of the jurors says that they have
8 read something or saw Mr. Bowman on television -- I didn't see
9 him but I understand he was on television, I was told so, but
10 the reporter that asked me to go on television, and I declined,
11 but the point is that there was an indication he was going to be
12 on, so I presume that he was, but the point is that one of the
13 jurors might very well, one of the respective jurors might say,
14 "I have read about this and I think this, that or the other
15 thing of the Government's position insofar as this is concerned
16 and, therefore, I do have a feeling that the Government has
17 manifested an attitude or position that is not acceptable to me,"
18 and in some way express themselves in a way that would result in
19 at least the question being raised about the propriety of an
20 excuse for cause or indeed a request that the Government be
21 permitted to exercise --

22 THE COURT: How far does that go? Supposing in
23 the course of a trial I exclude a confession on the grounds
24 that the defendant was beaten into giving it and that gains wide
25 publicity, do I ask the jury do they think less of the Government

1 because one of their agents beat a defendant?

2 MR. DORSEY: Obviously not because of the fact
3 that the Government would have no grounds to do anything at
4 that particular juncture except enhance its position by a
5 motion for mistrial, jeopardy having attached there would be
6 nothing that the Government could do about it.

7 This is something that we can do something about
8 because we haven't gotten to the stage that the actual
9 veniremen have been reduced to the actual jury seated in the
10 jury box.

11 THE COURT: You would make the same argument,
12 supposing the confession were suppressed before jury selection
13 on a motion to suppress?

14 MR. DORSEY: If there was anything about the
15 case or of the Government's position that resulted in a state-
16 ment of an attitude by a juror that they had read anything about
17 the case, then I would think certainly it would be grounds for
18 excuse for cause or at least would justify the exercise of a
19 peremptory if the Court refused to do so.

20 If the jury says, "Oh, yes, I read about the FBI
21 or some other Government agency beats all of its confessions out
22 of people and in consequence I would be adversely influenced if
23 I heard any confession out of any defendant," then I am sure Your
24 Honor would entertain a motion to excuse that juror for cause.

25 MR. WILLIAMS: That's not the kind of question we

1 are permitted to ask on voir dire. If the Government is
2 suggesting a challenge to the rules --

3 THE COURT: What is the defendant's view about a
4 motion for a continuance?

5 MR. DORSEY: I would make one observation in
6 relation to that, Your Honor. Obviously that's not the question
7 that's asked. The question that's asked, "Have you read anything
8 about the case or is there anything about what you have read
9 about anything pertaining to this matter that in any way would
10 influence you," that sort of question would be totally -- Mr.
11 Williams' suggestion contrary is something --

12 MR. BOWMAN: With respect to the Government's
13 motion for continuance, as this Court knows, the defendant's
14 papers in support of its original motion have been on file since
15 September 1st.

16 The Court ruled on October 15th and on November 4th
17 denied the Government's motion for reconsideration. So for three
18 and a half weeks the Government has known that we are going to
19 resume jury selection today. It's been no secret. And at the
20 eleventh hour or more the Government comes into Court and asks
21 for yet another delay after jurors have been summoned into court
22 and there is no reason for it.

23 There is a cost factor that the court has often
24 pointed out to defense counsel, and finally if jeopardy doesn't
25 attach because the jury is not sworn today, then how is the

1 Government penalized?

2 Yet if we have delay after delay after delay
3 there is a possibility, a strong possibility of prejudice to
4 the defendants.

5 So I see no reason to grant the Government's
6 motion for continuance. I have not been served a copy of
7 their application for mandamus as required by Rule 21 of the
8 Federal Appellate Rules, so I really don't know what the
9 content of those papers are.

10 Here we sit on the morning of jury selection,
11 it's been three and a half weeks since the Government knew we
12 were going to resume a jury selection and there is just no
13 reason that's been put forth by the Government to delay this
14 proceeding any further.

15 So we object to a continuance and do so
16 strenuously.

17 MR. WILLIAMS: I would like to associate myself
18 with all those remarks and say I also have not been served the
19 petition for mandamus and furthermore this morning was the
20 first I knew that the Government had been intending to ask
21 for a further delay of this matter, although apparently they
22 have known about it for almost a week.

23 It would seem to me that this case is at least
24 very close to the circumstances in which the Second Circuit
25 has recently ruled it is proper to attach costs against an

1 attorney on an individual basis who is responsible for such
2 delay.

3 MR. DORSEY: I point out, Your Honor, in the
4 papers that I have -- Your Honor has a copy of, a copy of this,
5 of all of the moving papers in the Second Circuit -- was mailed
6 on Friday last.

7 Your Honor has received his copy, we have
8 received our copies, and I am assuming that the Second Circuit
9 has received its copy. It specifically recites service on Mr.
10 Bowman, on Mr. Williams. The fact that they have not gotten
11 their copies yet in the mail, whether they were in the
12 morning's mail I have no way of knowing. They are en route.

13 I can't suggest anything more than that. If
14 they want to look at our copies I would be more than happy to
15 make them available.

16 The Second thing is that insofar as --

17 MR. BOWMAN: I was in my office on Friday, Your
18 Honor, service two and a half blocks away could have been
19 accomplished by hand-delivery.

20 MR. DORSEY: The petition was prepared, as Mr.
21 Hartmere said earlier, in Washington. It was mailed out of
22 Washington Friday.

23 As far as the delay factor is concerned, I think
24 that if the court was prepared this morning and contemplated
25 going forward with the presentation of evidence this morning,

1 that would be a different situation. All we are suggesting
2 is that the status quo be maintained until the Second Circuit
3 has an opportunity to review it.

4 Now, as far as the practicalities are concerned,
5 the Government really is not troubled by whatever Your Honor
6 does except that we point out that if you select a jury and the
7 Second Circuit says that one or two or three of the people that
8 are ultimately included in the selected group should not be in
9 there because they have been the subject of a valid peremptory
10 challenges, then for all intents and purposes you are going to
11 have to start all over again, I think.

12 That's the only purpose for the motion.

13 MR. BOWMAN: Your Honor, I think Mr. Dorsey made
14 a representation, or Mr. Hartmere, that the statistical workup
15 was being accomplished in Washington. It escapes me completely
16 of how any additional statistical input would have to come from
17 Washington that could not come from this State of Connecticut
18 or at the very, very least the Greater New Haven area.

19 It makes no sense. One government. Three
20 and a half weeks have passed since the original motion was --
21 since the motion for reconsideration has been denied. The
22 Government has had people checking our figures and if we were
23 wrong they had ample opportunity to show it, and there is no
24 basis for this at this hour, at this stage of the proceedings.

25 We strenuously object to any further delay.

1 MR. DORSEY: I might point out, I think in the
2 addendum to the papers that Your Honor has, there are five or
3 six what were found to be errors in the defendant's figures
4 and those have been flagged to the Court for its consideration
5 as to whether or not it has any significance in relation to
6 the order that was entered.

7 The statistical work that was done in Washington
8 was only one of several factors that Mr. Hartmere referred to
9 as taking up the time of the people in Washington as they
10 moved forward and processed this matter for the determination
11 of whether a mandamus should be petitioned.

12 THE COURT: Anything else to be said on this?

13 Well, I think I am going to deny the Government's
14 motion for a continuance to the extent that it seeks a delay
15 in order to present the issue in the October 15th ruling to
16 the Court of Appeals. I think the motion simply comes too late.

17 It's been six weeks since that ruling and three
18 weeks since the motion to reconsider was denied. It's a
19 criminal case and while I think the Government is right that
20 there will be very little lost by delaying, it seems to me
21 it's also true there will be very little gained.

22 At the very worst, even if the Court of Appeals
23 wishes to find error in all of the rulings made, the worse
24 that will happen is that a jury will be impaneled, which
25 includes three blacks, that the Government preferred to

1 challenge without there being any on the record indication of
2 non-racial violence and I don't think that's any harm to anybody.

3 I note that much of the petition, and apparently
4 the ostensible reason for the delay, is the further analysis
5 of facts and the claim of what are called five major errors
6 in the defendants' statistics.

7 I have been trying to determine whether those
8 claims of major errors vary the statistics to any appreciable
9 degree and my first impression of them is that they do not.

10 There is a reference at Appendix A that
11 apparently has recalculated the black percentage of challenges,
12 leaving out the Hispanic, and it says that using the black
13 figures there were twenty-two peremptories against twenty-two
14 black veniremen for an exclusion rate of what is in the
15 printed document as 8.4 percent.

16 That obviously is a major error on the part
17 of the Government and simple arithmetic will show it's not
18 8.4 but 81.4.

19 I trust that statistic will not be relied on
20 too strenuously in the Court of Appeals.

21 MR. DORSEY: It sounds like a typographical

22 error.

23 THE COURT: It may be but it's certainly a very
24 significant one. In any event if the Government thinks the
25 true figure is 81.4 instead of the 84.8 that I calculated from

1 the defendants' evidence, I hardly think that there has been a
2 major error effecting anything.

3 But more basically the reason I took a look at
4 the figures to see what was being presented is this: if in
5 fact the Government had significant new data to present, and
6 it seems to me that they would have presented it in the District
7 Court.

8 They asked for time to do that. They were given
9 time to do that and they did that. I have no idea whether
10 or not the Court of Appeals will be interested in claims of new
11 facts that have not been presented in the District Court but
12 that's a matter to be resolved in the Court of Appeals.

13 I am asked to grant a continuance essentially
14 because mandamus is being sought. I frankly don't know of any
15 authority or even any appropriateness for a District Court
16 delaying the course of a criminal trial to facilitate the
17 effort to have the presiding judged mandamus.

18 If there was to be some extraordinary prejudice
19 to the Government I could understand easing the mandamus rule
20 but there is not that here. If the naked legal issue were to
21 be tendered, that clearly could have been tendered weeks ago.

22 If the factual issue is to be reviewed on new
23 evidence, that could have been presented to the District Court.
24 So I simply don't think that it is at all appropriate to delay
25 a criminal case.

1 The Court of Appeals reminds us all the time for
2 the need to move criminal business expeditiously. If they wish
3 to intervene in this case I am sure they will be equal to the
4 task of fashioning a remedy that they think is appropriate.

5 But I think this request comes too late. I
6 think it doesn't take nearly this long to seek mandamus from
7 an interlocutory order in a criminal case.

8 I appreciate the Government has its case, it's
9 a large Government and the Solicitor General likes to review
10 these but if he was just to reassert the authority to exercise
11 supervisory power over Government appeals, then he has to do it
12 more quickly.

13 So the motion for continuance is denied.

14 MR. DORSEY: I would say, Your Honor, that the
15 statistics, giving the Court the differences, the errors, I
16 don't agree with the characterization of them as major. I do
17 not think they substantially change the basic figures on which
18 Your Honor relied. They do somewhat.

19 The purpose, and I insisted they be in the
20 petition, was to give Your Honor, and before the Court this
21 morning, was simply to give Your Honor an opportunity, not to
22 see new or different statistics, but to see the errors that we
23 felt were demonstrated in the figures as presented. It's just
24 simply a courtesy so there would be no claim that we had in any
25 way sought to use figures that were other than what the Court had
relied on.

THE COURT: We will turn shortly to the jury selection but before that final panel is brought in, I want to understand what the Government's position is as to voir dire. We have discussed that and Mr. Hartmere I presume will want some questions asked just simply to find out whether any of the veniremen have read anything about this case or have heard anything about this case, and I presume the next question would be -- particularly with respect to the jury selection process, and how far the Court decides to go down the route particularizing questions from that juncture and whether it's done individually would depend upon the answers that are received.

If nobody has heard anything about the process, then nothing further need be asked. If somebody specifically answers a question in a particular way I would presume that they would be followed up by questions designed to try to ascertain whether any of the veniremen have any adverse attitude insofar as the Government's position is concerned by virtue of anything they have seen or read.

Do the defendants have any view on that?

MR. WILLIAMS: It seems to me if any inquiry at all is to be made it ought to be rather a more standard inquiry of the group. Simply asking whether anything has occurred since they last were questioned regarding this matter which causes any of them to feel that they are not able to give all the parties a completely fair trial.

1 MR. BOWMAN: I have no comment.

2 THE COURT: Is there anything else concerning
3 that case that needs to be taken up before jury selection?

4 MR. DORSEY: Not as far as I know unless there
5 is something that develops. We are trying to find out what is
6 the situation of the matter in the Circuit Court of Appeals and
7 so far I have been unable to find out.

8 MR. BOWMAN: It does occur to me if a question
9 is posed to the jury, has the jury read about this case in the
10 papers, I think that there is a possibility of an adverse
11 inference being drawn by the perspective jurors against the
12 defendant that there is some notoriety about the defendants.

13 THE COURT: I always ask them have they read any-
14 thing and since it's been some time since they were last here
15 it's perfectly appropriate to update that inquiry. I won't ask
16 it as if some momentous adverse event happened in the interim
17 but rather an updating of the same inquiry.

18 (Discussion off the record.)

19 THE COURT: I made inquiry of the Clerk of the
20 Court of Appeals just now to ascertain whether any action was
21 presently before any judge there, just to be sure nothing
22 happened here right in the midst of some action being taken
23 there, and I am advised by the Clerk's office that they have
24 not received the mandamus papers.

25 MR. DORSEY: I've got the same inquiry being made

1 but by an indirect route from Washington since we did not file
2 them. I have been assured they were filed in the sense they
3 were mailed. And obviously they can get to Connecticut but
4 maybe they can't get to New York. I don't know what was done,
5 frankly. The Department --

6 THE COURT: Again, it seems to me if there was
7 such urgency that the Government felt it would be seriously
8 disadvantaged by proceeding today, this date was set back on
9 October 13th and if it really mattered to the Government, and I
10 don't mean the U.S. Attorney's office, I mean the Government,
11 the papers were available Friday and they could have been
12 delivered Friday.

13 The Clerk's office was open on Friday and could
14 have received them for filing, so I am still of the view that
15 we ought to proceed.

16 I take it it is agreeable to the parties that we
17 select only two alternates rather than five although I should
18 hear you on that if there is any preference to maintain the
19 original plan even though the reason for it no longer obtains
20 since we now plan trial a lot sooner than we did at the time.
21 At the time this was the last of many cases and there was some
22 likelihood of a delay before we got to trial.

23 MR. DORSEY: I was going to suggest, and I just
24 asked Mr. Hartmore and he concurs, I would be inclined to such,
25 and it's his case to try and maybe I ought to but out, but if

1 you select all five you have only got a potential for five.

2 Now, that would at least prevent the problem
3 that I was concerned with, which was at least in part the basis
4 for our motion for a continuance, and that is if you have a
5 jury of twelve, however they are made up so far as the three
6 peremptories are concerned, plus the five, then at least it
7 holds the status quo in the sense that if between now and the
8 time that you actually commence to taking of evidence, if the
9 petition ever gets to New York and some action is taken on it
10 that affects this trial, then you would have open to you the
11 options of in effect putting alternates into the regular panel
12 if it becomes necessary by virtue of any order that the Court
13 might make with respect to the three that were the subject of
14 peremptory challenges.

15 Do I make myself clear?

16 Other than that we have no basis for taking any
17 particular position.

18 MR. BOWMAN: It is the position of both defendants
19 that we would prefer and ask the Court for selection of a jury
20 of twelve and two alternates.

21 MR. HARTMERE: If we keep it with five alternates
22 and three peremptory challenges that were exercised by the
23 Government and are allowed to stand and say all three are on the
24 final jury of twelve, if we have five alternates they can be
25 replaced and we still have two alternates, however, if we pick

1 twelve jurors and two alternates today and some of the three,
2 all three or any portion thereof, we will end up with less
3 than twelve and two alternates when in fact the case is tried.

4 Again, there is a chance here of a further delay.
5 That's from the Second Circuit, depending on what their ruling
6 is. We have no way of knowing right now.

7 I don't think there is any prejudice to the
8 defendant by doing that if we set a date certain and we have
9 twelve jurors and five alternates perhaps even by agreement,
10 if the Court's original ruling in this case stands, then three
11 of the alternates in the order that they are selected can be
12 told not to report in.

13 THE COURT: Frankly it doesn't look to me like
14 there are particularly weighty considerations on either side of
15 this particular issue. I think the most appropriate thing to
16 do is to proceed with this case in as straightforward a manner
17 as possible and to do whatever would normally be done in the
18 absence of the Government seeking mandamus, and it seems to me
19 that since we would not have five alternates unless we antici-
20 pated and extended delay in the trial, we don't anticipate more
21 than a few days, then a jury of twelve and two alternates ought
22 to be sufficient. So I think we will just go ahead on that
23 basis.

24 MR. DORSEY: To ask a rhetorical question, what
25 is your proposal if, let's say Thursday of this week there has

1 been either a no action on mandamus or a denial of the mandamus
2 with respect to the order applicable to the further trial of
3 this case, then, of course, obviously you could go on no matter
4 what you do here today, but supposing as of that time you are
5 prepared to go forward with the trial of this case, you get
6 three within the fourteen of the selected, of the peremptory
7 challenged veniremen, what is your proposal or your contem-
8 plation with respect to the jury at that particular point if all
9 of a sudden, in other words, the mandamus petition has been
10 granted or a stay has been granted or something has been done
11 to sustain the Government's position with respect to the
12 exercise of those peremptory challenges?

13 THE COURT: Well, when you say if something has
14 been done, I can't anticipate what the something is, but I can
15 reasonably anticipate that the something will include a direction
16 as to what the Court of Appeals wants done. If they simply make
17 an order that leaves it unclear what I should do, then I will
18 have to decide what I should do but I don't think that I should
19 anticipate them issuing an unclear order.

20 MR. DORSEY: Whatever the form of their order,
21 supposing it just simply is couched in terms of sustaining the
22 Government's position on the propriety of its exercise of those
23 three peremptory challenges and in effect says those three
24 veniremen are out, they were challenged and whatever orders
25 thereafter, now, because there is nothing further before the

1 Court except that particular legal question insofar as this
2 trial is concerned.

3 In effect what I am really asking, can you
4 proceed with this trial under those circumstances, and I think
5 the rhetorical answer to the question is, of course, no, and
6 keeping the five in gives you the opportunity to answer that
7 question yes. That's the only reason I agree there is no
8 weighty issues involved.

9 The only purpose is to try to preserve for the
10 sake of continuing the proceeding with this particular trial,
11 without getting into what may be an irretrievable position with
12 respect to the jury is concerned.

13 THE COURT: I am not sure it is irretrievable.
14 Even the three people who will not be selected today for the
15 jury or alternates are still people who were properly identified
16 through a valid selection process and it may be they would be
17 available for substitution in the event orders of the Court of
18 Appeals made that the appropriate remedy.

19 MR. HARTMERE: I would also point out, Your
20 Honor, that there is a substantial chance of a delay in that I
21 am on trial before Judge Zampano. That trial will last all
22 this week and probably most of next week and the case agent is
23 the same, so this case could not be transferred -- ordinarily
24 we would have another assistant do it. I don't think we can do
25 that.

1 Mr. Bowman is going to be on trial after that,
2 so there is further delay problem.

3 THE COURT: We will have to deal with scheduling
4 matters as they come up.

5 (Jury present.)

6 THE COURT: This is the panel that was here for
7 the selection of the jury to try the case of United States
8 against Margaret Robinson and Patricia Savarese. As you will
9 recall we started that jury selection process some time ago.
10 I guess it was in the summer and we interrupted the process
11 and we are now ready to complete it. I ought to just call the
12 roll of the jurors that are on the list before me just to be
13 sure. Just acknowledge your presence as your names are called.

14 THE CLERK: Mr. Biron.

15 MR. BIRON: Here.

16 THE CLERK: Mr. Butts.

17 MR. BUTTS: Here.

18 THE CLERK: Mr. Davey.

19 MR. DAVEY: Present.

20 THE CLERK: Mrs. Dixon.

21 MRS. DIXON: Here.

22 THE CLERK: Mrs. Flander.

23 MRS. FIANDER: Present.

24 THE CLERK: Mr. Fiedler.

25 MR. FIEDLER: Here.

1 THE CLERK: Mrs. Gabinelli.

2 MRS. GABINELLI: Here.

3 THE CLERK: Mrs. Gargiulo.

4 MRS. GARGIULO: Here.

5 THE CLERK: Mr. Jahn.

6 MR. JAHN: Here.

7 THE CLERK: Mr. Kinsey.

8 MR. KINSEY: Here.

9 THE CLERK: Mr. Krol.

10 MR. KROL: Here.

11 THE CLERK: Mr. Lubchansky.

12 MR. LUBCHANSKY: Here.

13 THE CLERK: Mrs. Pappas.

14 MRS. PAPPAS: Here.

15 THE COURT: Mrs. Nita Pappas.

16 THE CLERK: Mrs. Rando.

17 MRS. RANDO: Here.

18 THE CLERK: Mr. Sullivan.

19 MR. SULLIVAN: Here.

20 THE CLERK: Mr. Tolman.

21 MR. TOLMAN: Here.

22 THE CLERK: Mr. Wiltsey.

23 MR. WILTSEY: Here.

24 THE COURT: Anyone present whose names have not
25 been called? All right. We agree on that.

When you were first here for jury selection I asked you some questions to find out if there was any reason why you ought not to serve on this case. I don't propose to go through that again in length since counsel are the same and defendants are the same, et cetera.

I did ask you, as I do in every criminal case, at that time whether you read anything about the case and since it's now been some time since you were here before, I will ask that same question again, update it. Has anyone read anything about this particular case? All right.

I will just ask you in general the same question I asked you at that time, just to update the inquiry. Does any member of this panel know of any reason why you ought not to serve as a juror in this case or why you would not be a fair and impartial juror if selected as a member of the jury panel in this particular case, fair to the Government and fair to the defendants? All right.

I will ask the Clerk to draw from the names available for jury selection fourteen names. The first twelve will be the jury of twelve and the next two the alternates in the order selected.

The Clerk advises me that in calling the names he will be using the veniremen number as it appeared on the original sheet and not today's sheet.

THE CLERK: As your name is called please step

forward to the jury box. Fifty-eight Richard Wiltsey; fifty-six Frederick Tolman; forty-seven Nita Pappas; thirty William Jahn; twelve Mrs. Lillian Dixon; thirty-three William Kinsey; sixteen Mary Fiander; twenty-two Susan Gargiulo; number eleven Ira Davey; number thirty-eight Harold Lubchansky; number thirty-five Theodore Krol; number seventeen Andrew Fiedler; number twenty-one Mrs. Leonore Gabinelli; number forty-nine Mrs. Ruth Rando.

THE COURT: Other than that, is the jury as selected acceptable to the Government other than matters made on the record?

MR. HARTMERE: Yes.

MR. BOWMAN: Yes.

MR. WILLIAMS: Yes.

(The jury was sworn.)

THE COURT: You have now been selected and sworn as the jury in United States against Robinson and Savarese. We won't start the evidence today. As a matter of fact I am not able to tell you today the starting date. It is possible it could be towards the end of this week but I think more realistically next week.

We have two alternates impaneled so if a particular starting date does create some very unexpected personal problem we would be able to use an alternate. I hope we will be able to proceed with the entire group of twelve plus two alternates so we will be sure of having twelve at the conclusion of the case, but

1 as far as scheduling I will simply leave it that the Clerk's
2 office will notify you and give you as much notice as possible
3 when we know the exact starting date.

4 Between now and then let me caution you, as I do
5 in every case, please don't endeavor to find out anything about
6 this particular case or permit anyone to discuss it with you.
7 Just wait until you come back to court, hear the evidence as it
8 is presented in the court room and confine your decisions solely
9 to that.

10 All right. This jury has been excused until
11 summoned by the Clerk when you will get notice of that.

12 A JUROR: You usually state your approximate
13 length --

14 THE COURT: Three or four days a fair estimate?

15 MR. WILLIAMS: At the most.

16 MR. HARTMERE: Yes.

17 THE COURT: I don't think there is any likelihood
18 of an extended trial. I think three or four days is quite a
19 realistic estimate.

20 All right. Thank you very much.

21 (The jury was excused.)
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

-----X
UNITED STATES OF AMERICA,

vs.

MARGARET ROBINSON & PATRICIA SAVERESE,
Defendants.

:
:
Criminal

:
No. N-76-63
:
-----X

New Haven, Connecticut
March 7, 1977

B e f o r e :

Hon. JON O. NEWMAN, U.S.D.J.

A p p e a r a n c e s :

For the Government:

MICHAEL HARTMERE, Esq..
Assistant U. S. Attorney
270 Orange Street
New Haven, Connecticut

For the Defendants:

ANDREW BOWMAN, Esq.
Federal Public Defender
770 Chapel Street
New Haven, Connecticut

JOHN WILLIAMS, Esq.
265 Church Street
New Haven, Connecticut

SANDERS, GALE & RUSSELL
Certified Reporters

100

600 TRINITY AVENUE
HARTFORD, CONNECTICUT

141 CHURCH STREET
NEW HAVEN, CONNECTICUT

1 THE COURT: The defendants are present and all
2 counsel are present. The matter is now back in the District
3 Court upon the mandate of the Court of Appeals, which was
4 received in this court on February 23. I am advised by the
5 Clerk of the Court of Appeals that it was issued by that Court
6 on February 16.

7 Is it correct that both counsel for the defendants
8 have had an opportunity to see and consider the decision of
9 the Court of Appeals?

10 MR. WILLIAMS: Yes.

11 MR. BOWMAN: Yes.

12 THE COURT: And to give thought to the choice that
13 the Court of Appeals indicates is available to each client at
14 this time?

15 MR. WILLIAMS: Yes, your Honor.

16 THE COURT: Let me put it on the record to be sure
17 our understanding is in agreement.

18 First of all, the mandate makes clear that the matter
19 is remanded to the District Court for further proceedings in
20 accordance with the opinion of the Court of Appeals; and that
21 opinion on its last page indicates that at this point in this
22 case the defendants each has a choice they can make, and it's
23 clear they do not have to make it the same way. If they make
24 different choices, the cases will be severed, but, in any event,
25 the choice available to each is as follows:

1 First of all, they can elect to proceed with the
2 jury as originally selected, with modification of that jury
3 according to the Court of Appeals decision, and those modifica-
4 tions would be that the three veniremen who were challenged by
5 the government and whose challenges were rejected by this Court
6 would become available for service, and that would be accomplished
7 by excusing from the present jury the two members of the petit
8 jury who were challenged by the government, replacing them
9 with the two alternates and replacing the two alternates with
10 the two remaining members of the final panel who were not
11 challenged by the government. The choice of proceeding with a
12 jury composed that way is available to the defendants, or either
13 of them.

14 The second choice available is a mistrial, which would
15 have the effect of leading to the impaneling of a new jury,
16 in other words, a total new jury selection process which would
17 begin with a new array and the regular selection process.

18 First of all, do both counsel understand those choices?

19 MR. WILLIAMS: Yes.

20 THE COURT: Have your clients had a chance to discuss
21 them with you?

22 MR. BOWMAN: Yes, we have discussed them.

23 THE COURT: Are you ready to indicate how you wish
24 to proceed?

25 MR. BOWMAN: On behalf of the defendant Margaret

Robinson, as the Court is well aware, on November 29, a jury was selected, impaneled and sworn, which contain two blacks and ten whites.

It is my client's position she had a right to be tried by that jury. We object to the discharging of that jury as selected on that day, and we object to the impaneling of a new jury, and that's our position.

We do not regard a mistrial as a choice because I don't believe the Court of Appeals in its opinion has given us that choice, but has rather stated that if we do not elect, as they first suggest, that this Court shall declare a mistrial, therefore, we do not choose and we do not move the Court for a mistrial, but rather we object to the discharging of that jury as it was selected on November 29, impaneled and sworn.

THE COURT: When you say the discharging of that jury, the Court of Appeals has not suggested, nor have I, that the jury presently impaneled be discharged, but rather that if we proceed with that jury, the composition of that jury be modified as the Court of Appeals has indicated.

MR. BOWMAN: Well, it's not the same jury.

THE COURT: That's quite right.

MR. BOWMAN: They are ordering the removal of two of those twelve jurors.

THE COURT: That's correct.

MR. BOWMAN: I object to that.

1 DEFENDANT ROBINSON: They would be all white.

2 THE COURT: That would be the result, that's correct.

3 MR. WILLIAMS: If it please the Court, the jury as
4 presently sworn consists of twelve members and two alternates.
5 The Court of Appeals has directed only that the two black people
6 be stricken, which would leave a jury of twelve with no alter-
7 nates. There is clearly no manifest necessity for bringing in
8 outside people and adding them to that jury, which would, in
9 effect, mean a new jury. We object to it. We object to a
10 mistrial. We object to proceeding with anything other than the
11 jury that we have because even under the opinion of the Court
12 of Appeals, it is still possible to try this case with a jury of
13 twelve as already selected and sworn.

14 THE COURT: I am not sure I understand that last
15 point. Are you suggested that we replace the two jurors whose
16 challenges have been reinstated, replace them with the two
17 alternates, and then not select two additional alternates?

18 MR. WILLIAMS: We are not asking that, because we
19 believe we should be tried by the jury as presently constituted.

20 However, it's our position that that is the only
21 possible alternative which would not violate our clients' right
22 to be protected against double jeopardy.

23 THE COURT: Well, as to that last variation, the
24 Court of Appeals has, in outlining what I have called the first
25 alternative: that is, using most of the present jury, in

1 explaining that alternative, the Court of Appeals did indicate
2 that after the two alternates replaced the two members of the
3 jury whose challenges are being reinstated, that the two
4 unassigned veniremen from the jury pool should take the place
5 of those two alternates. I suppose the Court of Appeals
6 specified that in order to insure there would be a jury of
7 twelve and two alternates.

8 I would further think that the defendants can elect
9 to proceed without alternates, provided they also agreed to
10 accept less than a jury of twelve in the event a regular juror
11 became ill.

12 In other words, I don't think we need to start off
13 only with twelve people and take the risk that if one person
14 gets sick, we have to start over again, so if you want to do
15 without alternates, that could be done, but it could only be
16 done if the need for alternates were avoided.

17 MR. WILLIAMS: I respectfully disagree with your
18 Honor. The Constitution does not require us to elect among
19 its provisions. We are entitled to a jury of twelve and we
20 are entitled to proceed with the jury that's already been
21 selected and sworn.

22 THE COURT: I quite agree with you, the Constitution
23 doesn't require you to elect them on its provisions, but the
24 Court of Appeals has already dealt with your view of one of its
25 provisions, so that we are obliged to proceed under the ruling

1 that that Court has made.

2 As I say, while I think it would be possible, if you
3 object to two new alternates, to dispense with them, provided we
4 had an assurance that we wouldn't need alternates. I don't
5 think you have to accept a jury without any minimum, but it
6 seems to me if you did not want to impanel two new alternates,
7 then you would have to agree at this point to accept a jury of
8 ten in the event two of the twelve became ill or otherwise
9 incapacitated.

10 I am not in any way suggested that is something you
11 must do. I am simply saying that's something that would be
12 a condition of dispensing with the requirement of impaneling
13 two alternates.

14 MR. WILLIAMS: We cannot agree to that, your Honor.

15 THE COURT: Is that true of you, also, Mr. Bowman?

16 MR. BOWMAN: Yes. My position is a little different
17 than Mr. Williams', which really does need elaboration. I
18 have stated my client's position when I first spoke in response
19 to the Court's question of how we elect to proceed, and the
20 question is substantially answered by us by saying that we
21 object to the recomposing of this jury. There is no manifest
22 necessity for doing so, and we object to the impaneling of a
23 new jury on the ground that my client will be placed twice in
24 jeopardy of losing her liberty.

25 She had the right to be tried and have the issue of

1 her guilt or innocence be determined by the jury that was
2 impaneled and sworn November 29. Since the Court of Appeals
3 will not allow us to have that jury, then I object to any
4 impaneling of any new jury, whether it's by the substitution of
5 two white people for the two black jurors who were, in my view,
6 properly selected, impaneled and sworn, or by the discharge of
7 this entire jury by the Court's ordering of a mistrial and the
8 selection of a new jury.

9 THE COURT: Well, I think you're one step ahead of
10 us at the moment. The first issue is to be clear we all under-
11 stand what the only two choices are.

12 Mr. Williams had raised a possible refinement of the
13 first choice, which contemplated the possibility of dispensing
14 with the impaneling of two new alternates, and I indicated that
15 while that could be done, it could only be done on the condition
16 that we did not run the risk of finding that trial interrupted
17 for lack of the two alternates. That's why I suggested agreeing
18 to a jury of ten in the event two became incapacitated.

19 Mr. Williams says that refinement is unacceptable to
20 him, and I am not clear whether it's unacceptable to you, as
21 well, since you didn't raise the initial objection --

22 MR. BOWMAN: Mr. Williams and I may have different
23 views. ...

24 THE COURT: In any event, as far as the first choice
25 given by the Court of Appeals, you have no suggestion as to

1 modifying that choice?

2 MR. BOWMAN: No, I don't.

3 THE COURT: Then, I think it's entirely clear that
4 we are left only with the two choices as specified by the Court
5 of Appeals.

6 I can appreciate that your views, as you have
7 expressed them, is that you don't find either choice satisfactory.
8 You prefer to proceed with the jury as it was selected -- I
9 don't recall the date, offhand, but when we were last year.

10 The Court of Appeals has made it clear that that
11 option is not available, that there exists at this time only
12 two choices: proceeding with the jury as originally picked,
13 with the modifications that the Court of Appeals has ordered,
14 and which we discussed this morning, and as the Court of Appeals
15 indicates, if that procedure is elected, we will go forward that
16 way and make the necessary revisions in the jury and then try
17 the case.

18 If that procedure is not elected, in effect, while I
19 appreciate you don't view it this way, but, in effect, you're
20 making the second choice, because you only have two choices.

21 MR. BOWMAN: I only have -- I am called upon to make
22 an election today as to whether or not I accept the suggestion
23 of the Court of Appeals, and in the absence of my accepting
24 that suggestion of the Court of Appeals, then I believe the
25 next step is mandated by the Court of Appeals to your Honor.

1 I am not choosing the second alternative.

2 THE COURT: I am not sure whether our difference is
3 semantics or not, but to say you're being asked only to select
4 the first choice, in a sense, is accurate and, yet, since you
5 only have two choices, you leave out the context. The context
6 is there are only two choices. If you elect the first choice,
7 that's what we will do. If you don't elect the first choice,
8 the inevitable consequence of that -- and you should be clear
9 in your mind that you know it before you make your decision
10 about electing the first choice -- the inevitable consequence
11 is the second choice. Whether you view it as a choice or not
12 is another matter, but the reality is there are only two
13 choices.

14 If you accept the first choice, that's what we will
15 do. If you decline to accept the first choice, or even stand
16 mute, if you don't elect the first choice, that will have the
17 effect and will be treated by me as an election of the second
18 choice, and I will then follow the Court of Appeals decision
19 and declare a mistrial and proceed to new jury selection.

20 I want to be sure you both understand my understanding
21 of the situation at the moment as I have just expressed it.

22 MR. BOWMAN: I understand what your Honor is saying,
23 and --

24 THE COURT: Then, I will ask you specifically whether,
25 given those two choices of the jury composition as I have

1 explained it or a mistrial, and given only those two choices,
2 do you elect to proceed according to the first choice?

3 MR. BOWMAN: I do not elect to proceed in accordance
4 with the first choice.

5 THE COURT: Mr. Williams, do you understand the
6 choices as I have explained?

7 MR. WILLIAMS: I understand what your Honor has said.
8 I would like to add one additional comment, and that is that so
9 far as I am aware, we have no report that any of the remaining
10 twelve members of the current jury has become ill or in any way
11 indisposed. We have no manifest necessity for proceeding with
12 anything other than those remaining twelve, so according --

13 THE COURT: I disagree with you on that. It seems
14 to me there is always a need for alternates, simply because none
15 of us can predict who is going to be ill tomorrow. The fact
16 that they were not ill yesterday does not dispense the need for
17 alternates. Alternates are needed as insurance to be sure
18 during the course of a trial, if someone becomes ill, you can
19 continue. I don't suppose any of us can warranty that there
20 won't be illness tomorrow.

21 MR. WILLIAMS: That's true in any trial. If we select
22 two alternates, we can't guarantee three people won't get sick.
23 That doesn't preclude us from proceeding with our trials in the
24 usual manner.

25 Here we all agree this is going to be a relatively

short trial, so I still believe there is no manifest necessity.

THE COURT: When you say a manifest necessity, there is not a plague in the community, if you mean the risk of contagion is high. There is the normal risk that in the course of even a short trial somebody may become incapacitated.

Now, if we proceed with the first choice: that is, the recomposition of the jury, according to the Court of Appeals decision, your prediction may be right, the twelve are all we will ever worry about, and if in a short trial nobody gets incapacitated, we may never use the alternates that the Court of Appeals indicates should be impaneled, so that if your prediction is right, we will just proceed with the twelve you now know about.

If your prediction is wrong, we will have those two alternates so there is no inevitability that we will use the alternates in the sense of using them as part of the body that deliberates. But I don't think I can take the risk that we should proceed without impaneling, so we still, as far as I can tell, confront only the two choices the Court of Appeals has given us.

MR. WILLIAMS: The first alternative suggested by the Court of Appeals is completely unacceptable to me and my client.

THE COURT: Then, in that event -- you understand that in declining to elect that alternative, you are operating only among the two choices I have indicated?

1 MR. WILLIAMS: I understand that your Honor has taken
2 the position that your Honor will declare a mistrial if we
3 reject the first alternative.

4 THE COURT: Yes.

5 MR. WILLIAMS: I object to your doing that. I under-
6 stand you will do that.

7 THE COURT: So you understand what will happen in the
8 event you don't elect the first choice?

9 MR. WILLIAMS: Yes.

10 THE COURT: Then, I take it from what you said, that
11 you do not elect to proceed with what we have called the first
12 choice?

13 MR. WILLIAMS: That's correct.

14 MR. BOWMAN: I would also like to add that I object
15 to your Honor declaring a mistrial, as well. I want the record
16 to be clear this is by no means any type of a motion for a
17 mistrial in this case.

18 As I read the decision, the Court of Appeals is
19 ordering you, in the event that we do not elect to proceed with
20 the first choice, as you have outlined this morning, that you
21 shall declare a mistrial, but we are not moving for a mistrial,
22 and we object to a mistrial.

23 MR. WILLIAMS: That's my position, as well.

24 THE COURT: I understand that, in terms, you're not
25 moving for a mistrial, but it's also clear that there are only

1 choices, and so the rejection of the first choice is inevitably
2 a reluctant, and perhaps unwilling, acceptance of the second
3 choice. The fact that you don't say you like it or say you
4 move for it doesn't make it any the less the inevitable alter-
5 native to your rejection of the first choice.

6 I think I understand your position. You really
7 don't think it's right you have to make the choice at all.

8 MR. BOWMAN: I read the opinion. I understand what
9 the opinion says, but to reject a jury, which we feel will not
10 be a fair and impartial jury --

11 DEFENDANT ROBINSON: Is the same thing going to happen
12 again? If you pick another jury and come back, they are going
13 to throw the black people off and have an all white jury, and
14 we will keep opposing it. How long will that go on?

15 THE COURT: That's certainly a fair question.
16 Unfortunately, I really can't give you the answer because, again,
17 it means predicting the future. If you mean is the government
18 going to exercise their peremptory challenges against blacks,
19 I don't know.

20 The one aspect I can answer for you is that if blacks
21 are challenged peremptorily by the government in this case,
22 unless the New Have figures have changed adversely since what
23 was presented in connection with this hearing, I would be
24 obliged in the absence of new evidence to accept their challenges,
25 but whether they will exercise them, I don't know.

1 I think the record is clear that two choices have
2 been outlined, and that the defendants, having been asked
3 specifically whether they accept the first choice, have both
4 made clear that they do not, and they have made it clear they
5 are not agreeable to the second choice, but I think it's clear
6 that they recognize that I will proceed to the second choice
7 based on their rejection of the first choice.

8 MR. HARTMERE: May the government be heard on this?

9 THE COURT: Yes.

10 MR. HARTMERE: Your Honor, I believe the defendants
11 here, their arguments -- they are trying to have it both ways,
12 and they can't have it both ways. I don't think they can object
13 to both alternatives.

14 The mandate of the Court of Appeals and the Court
15 of Appeals decision in Robinson is the law of this Circuit now.
16 They are objecting to both, and, obviously, the decision says
17 it's one way or the other.

18 They may not agree with certain decisions of the
19 Court of Appeals on Fourth Amendment, either, but, unfortunately
20 for them in that case, it's the law of the Circuit.

21 I just want to put on the record that that's the way
22 the government views it, that the government on November 29
23 opposed jury selection in swearing the jury, both defendants at
24 that time moved for it, and then after the decision of the Court
25 of Appeals, now they argue against that decision.

1 The government's position is they must elect one or
2 the other under the decision. In other words, the government's
3 position is they can't object to both. That's the law. They
4 have to take one or the other.

5 THE COURT: I suppose before ruling I should raise
6 with the defendants a possibility which is always present,
7 wholly apart from the issue raised in this case, and that is
8 waiver of jury trial. Neither defendant has ever indicated they
9 want to waive, and I am certainly not suggesting that they
10 should, but since that obviously is an option, I think it should
11 be identified before any final decision is made at this stage.

12 It's not an option spelled out by the Court of
13 Appeals specifically, but it's always an option in any criminal
14 case, so I just identify it in the event either defendant wishes
15 to consider that option.

16 I take it you do not?

17 MR. BOWMAN: Not at this point.

18 THE COURT: You do not, Mr. Williams?

19 MR. WILLIAMS: No.

20 THE COURT: In accordance with the mandate and opinion
21 of the Court of Appeals, the defendants, having been fully
22 advised and appear fully to understand the only two choices as
23 to jury selection which have been left to them by the decision
24 of the Court of Appeals, and having declined to elect the first
25 choice of taking the existing jury, reinstating the government

1 challenges, excusing the two challenged jurors from the group of
2 twelve, replacing them with the two alternates, and then replac-
3 ing the two alternates with the two unchallenged members of the
4 jury pool, that choice having been -- having not been elected
5 by the defendants, with the realization on this record that
6 their failure to elect that choice will result in my granting
7 a mistrial, I will hereby declare a mistrial in the cases of
8 both defendants, and the matter is reassigned for trial. The
9 opinion says "with reasonable promptness", and I expect to do
10 that today, which I think is reasonably prompt.

11 MR. WILLIAMS: I am sorry. Having discussed this
12 with one of your clerks on Friday -- was not under the impression
13 we would be under any circumstances selecting a jury today.
14 I should advise the Court that I am under orders to select a
15 jury in the state court at 2:00 this afternoon, and I am under
16 -- somewhat less stringent order from court in New Haven to
17 expend the remainder of my morning in preliminary hearings in
18 criminal matters.

19 THE COURT: How will this conflict with your state
20 court trial? I don't expect we will try the cases today.
21 There is a firm, ready case to be tried first, and at least
22 one other to follow that one.

23 MR. WILLIAMS: I was under the impression your Honor
24 was saying we would select another jury today, and I was suggest-
25 ing that I -- obviously, your Honor has a -- considerably more

1 authority than the state court judges, who have asked me to do
2 other things, however, I had assured them on the basis of my
3 understanding of what would happen this morning that I would be
4 available to the state courts today.

5 If your Honor remains in attendance, obviously, I
6 will remain in attendance.

7 THE COURT: What type of proceeding are they hoping
8 to complete with you today?

9 MR. WILLIAMS: I am to begin a jury selection in
10 the Court of Common Pleas in West Haven at 2:00. Between now
11 and then, Judge Falsey is waiting for me in the Court of Common
12 Pleas in New Haven for two probable cause hearings, which have
13 been postponed previously.

14 Mr. Bowman and I are both in agreement we would like
15 an opportunity to file written motions to dismiss on the double
16 jeopardy issue here. I would respectfully request one week
17 for the filing of that motion.

18 MR. BOWMAN: On behalf of defendant Robinson, I
19 request an opportunity to file a written motion, your Honor.

20 THE COURT: You both want that motion submitted and
21 decided before a new jury is selected?

22 MR. WILLIAMS: Yes, your Honor.

23 THE COURT: I take it what the current situation,
24 then, is: you are each requesting that the jury selection be
25 deferred -- be continued for at least one week until your

1 motions can be filed, and then further continued, assuming your
2 motion is timely filed within one week, until decision on that
3 motion?

4 MR. BOWMAN: Yes.

5 THE COURT: Any objection to that by the government?

6 MR. HARTMERE: The government is prepared to go
7 forward. The government would suggest going forward today.

8 I believe the law is fairly clear and the circumstances
9 are present in this case. The defendants are moving for the
10 mistrial. I think Gorey versus United States, and Illinois
11 versus Sommerville, the whole line of double jeopardy cases,
12 that where the defendant moves for a mistrial, no double jeopardy
13 attaches. That's what we have in the present case.

14 MR. BOWMAN: The record should be absolutely totally
15 clear the defendants have never moved for a mistrial on this
16 case.

17 MR. HARTMERE: The record should also be clear, your
18 Honor, that the government's position, as stated before, is,
19 under the decision of the Court of Appeals in the Robinson case,
20 the defendants had two options. They objected to both. They
21 objected, in effect, to the law, which they obviously cannot do.
22 They move for a mistrial.

23 MR. BOWMAN: No, your Honor. I think anybody who
24 reads the decision --

25 THE COURT: I think the record is very clear as to

1 what choices the defendants had and what they did in light of
2 those decisions. I think it's abundantly clear that, in terms,
3 they did not say, "We move for a mistrial." Whether their
4 election, in light of the Court of Appeals choice, is the type
5 of election which when it results in a mistrial does not provide
6 the basis for any relief under the double jeopardy clause is
7 the issue, I presume, you want to present in your motion?

8 MR. WILLIAMS: Yes.

9 MR. BOWMAN: Yes.

10 THE COURT: It may have been that the law is clear.
11 I don't know how many cases there have been when a defendant
12 has been given two choices, one of which is a mistrial, and
13 declines the first choice. It may be there are many cases on
14 that. Not too many come to mind at the moemtn, but perhaps
15 the government will supply me with a long list.

16 MR. HARTMERE: The government's position is, your
17 Honor, that, in effect, the defendants move for a mistrial.
18 That's what I said before, and where the defendants move for a
19 mistrial, the law is clear.

20 THE COURT: Well, I will look forward to the
21 authorities both sides wish to submit on this issue.

22 The motion for continuance to the extent indicated
23 is granted.
24

25 - o o o -